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No. 12,045

IN THE

United States Court of Appeals

For the Ninth Circuit

HOWARD T. JENSEN,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
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Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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Subject Index

	Page
Jurisdictional statement	1
Facts of the case	2
Question involved	3
The indictment	3
The statute	5
Argument	5
The indictment does not fail to recite an offense against the United States	5
Conclusion	8

Table of Authorities Cited

Cases

	Pages
Chatwin v. United States, 326 U. S. 455, 464	6
Davis v. West, 71 F. Supp. 377	7
Goldsmith v. Sanford, 132 F. (2d) 126	3, 5
Kelly v. Johnston (C.C.A. 9), 128 F. (2d) 793	5
Knewel v. Egan, 268 U. S. 442	3
Stewart v. Johnston, 97 F. (2d) 548	5
Telfian v. Johnston, 122 F. (2d) 346	5
United States v. Parker, 19 F. Supp. 450, affirmed, 103 F. (2d) 857, 860, 861	6, 7

Statutes

Federal Kidnaping Act, 47 Stat. 326; 48 Stat. 781; 18 U.S.C.A. 408a	5
28 U.S.C.A., Sections 451, 452 and 453	1
28 U.S.C.A., Sections 463 and 225	1
28 U.S.C.A., Sections 2241, 2243 and 2255	1
28 U.S.C.A., Section 2253	1

No. 12,045

IN THE

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For the Ninth Circuit

HOWARD T. JENSEN,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California dismissing appellant's petition for writ of habeas corpus. (T. 38-39.) At the time the action was brought, the District Court had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A. Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the District Court dismissing the petition is now conferred upon this Court by Title 28 U.S.C.A., Section 2253, but at the time the notice of appeal was filed herein such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

FACTS OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus in which he contended that his conviction under the Federal Kidnaping Act was void because the indictment by failing to charge that the victim was held for "ransom or reward", or for any reason, whatsoever, without describing the same, did not recite an offense against the United States (T. 1-32). The Court below issued an order to show cause (T. 33), and the appellee filed a motion to dismiss the petition on the ground that the same failed to state a cause of action (T. 34). The appellant then filed a reply to appellee's motion to dismiss (T. 35), and the matter was then submitted. Thereafter the Court below filed the following order dismissing the petition for writ of habeas corpus and discharging the order to show cause:

> "Petitioner, by this habeas corpus petition, seeks his release from respondent's custody on the ground that the trial Court was without jurisdiction to impose the sentence under which he is held. An order to show cause issued and the respondent has moved to dismiss the petition on the ground that it fails to state a cause of action upon which relief can be granted.
>
> "The pleadings disclose that the petitioner was indicted for a violation of the Kidnaping statute, 18 U.S.C.A. 409a, that he was tried by a jury and found guilty, and that he was represented by counsel throughout the proceedings. He now alleges that the indictment failed to charge an offense under the Federal Kidnaping Act for the

reason that the essential elements of the crime of kidnaping were omitted. The indictment charged the crime in the statutory language but omitted the phrase "and held for ransom or reward or otherwise." Whether the indictment is sufficient to charge an offense under a statute that is not claimed to be invalid is a question for the Court trying the issues under the indictment. *Goldsmith v. Sanford,* 132 F. (2d) 126. Habeas corpus is not a remedy to test such a question. *Knewel v. Egan,* 268 U.S. 442, *Kelly v. Johnston,* 128 F. (2d) 793 and cases cited therein. It follows, therefore, that respondent's motion to dismiss the petition must be granted and it is so ORDERED. Said petition is hereby DISMISSED and the order to show cause heretofore issued is hereby DISCHARGED.

"Dated June 9, 1948.

Michael J. Roche,
United States District Judge."

(T. 38-39.)

From this order appellant now appeals to this honorable Court (T. 40).

QUESTION INVOLVED.

Does the indictment fail to recite an offense against the United States?

THE INDICTMENT.

The indictment under attack herein by the appellant reads as follows:

"District of Utah:

Central Division: SS. The grand jurors for the United States of America impaneled and sworn in the District Court of the United States for the Central Division of the District of Utah the November term of said Court in the year 1942, and inquiring for said District of Utah, upon their oaths present:

That heretofore, to-wit: on March 18, 1943, at Wendover, in the Central Division of Utah, a person, to-wit: Richard F. Dresher, Jr., was unlawfully seized, confined, kidnapped, abducted and carried away by

Delton Eugene Roper,
and Howard T. Jensen,

and that thereafter, to-wit: on March 18, 1943, said Dalton Eugene Roper and Howard T. Jensen, hereinafter called defendants, then and there, well knowing said Richard F. Dresher Jr., to have been seized, confined, kidnaped, abducted and carried away as aforesaid, unlawfully and feloniously did transport, cause to be transported and aid and abet in transportation, from Wendover, in the Central Division of the District of Utah, to a point about five miles west of Wendover, Nevada, and within the District of Nevada; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

A True Bill:
E. A. Bjorklund
Foreman of the Grand Jury

Dan B. Shields
United States Attorney

Filed: March 27, 1943."

THE STATUTE.

The Federal Kidnaping Act, 47 Stat. 326; 48 Stat. 781; 18 U.S.C.A. 408a, punishes any one who knowingly transports in interstate or foreign commerce "any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof."

ARGUMENT.

THE INDICTMENT DOES NOT FAIL TO RECITE AN OFFENSE AGAINST THE UNITED STATES.

The indictment is in the language of the statute, and as the Court below stated in its order, is sufficient against collateral attack on habeas corpus, citing *Goldsmith v. Sanford,* 132 F. (2d) 126; *Knewel v. Egan,* 268 U.S. 442; *Kelly v. Johnston* (CCA-9), 128 F. (2d) 793, cases on which appellee herein also relies. To the same effect see the case of *Telfian v. Johnston,* 122 F. (2d) 346, wherein this honorable Court made a similar ruling even though the indictment therein was far more defective than here (if this indictment can in any wise be considered defective, which appellee does not concede). See also a similar decision of this honorable Court in the case of *Stewart v. Johnston,* 97 F. (2d) 548.

The sufficiency of the indictment can be tested from the language of the indictment alone and if it appears therefrom that an offense over which this Court has

jurisdiction has been recited, no further inquiry can be made into the factual situation, which in effect is what appellant is trying to accomplish by way of habeas corpus. The gravamen of the offense is the interstate transportation of a person who has been unlawfully seized against his or her will. Such a recitation is set out in our indictment in question. The motive, or object, or purpose of the unlawful abduction is not, as appellant urges, an essential element of the crime, and failure to recite the same in the indictment obviously does not make it fatally defective. In *Chatwin v. United States,* 326 U.S. 455, 464, on which appellant herein, for some unexplainable reason, also relies, the Supreme Court said that the purpose of the Federal Kidnaping Act was to outlaw interstate kidnaping and that the essence of the crime of kidnaping is the "involuntariness of seizure and detention".

It should be pointed out here that in the original Federal Kidnaping Act there was a provision that the victim had to be kidnaped for "reward or ransom" in order to bring the case within the purview of the statute. But in 1934, as was pointed out by the Court in the case of *United States v. Parker,* 19 F. Supp. 450, affirmed 103 F. (2d) 857, Congress realized the inadequacies of such limitation and amended the statute by adding the words "or otherwise" after "ransom or reward". The Court also went on to say, and the appellant herein does not contend otherwise, that the "curious rule of ejusdem generis" can not logically be applied to the adverb "otherwise" and

that the "cases holding to the contrary seem to us lacking in grammatical understanding". In affirming the lower Court, the Court of Appeals for the Third Circuit, in *United States v. Parker,* supra, said at pages 860 and 861:

> "The statute prohibits the interstate transportation of persons kidnapped for other reasons than ransom or reward. It is not restricted to cases involving pecuniary benefit to the kidnappers. Gooch v. United States, 297 U.S. 124, 56 S. Ct. 395, 80 L. Ed. 522. We think that Congress by the phrase 'or otherwise' intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it."

In *Davis v. West,* 71 F. Supp. 377, the Court citing *United States v. Parker,* supra, with approval, said:

> "The indictment was returned under Section 408a, Title 18 U.S.C.A. The section is designed to punish one guilty of the transportation of a kidnapped person in interstate commerce where same is done for ransom or otherwise. The purpose and object of the transportation is but an incident of the kidnapping and the transportation of the person so kidnapped in interstate commerce. Whatever the motive of the accused, it is the purpose of the statute to punish for such kidnapping and transportation."

CONCLUSION.

In view of the foregoing it is obvious that the failure of the indictment to allege that the victim was held for ransom or reward, or for any reason, does not make it, as appellant contends, fatally defective, and thus subject to collateral attack. There is no authority to sustain the proposition which appellant advances; there is no merit in his position.

Accordingly, it is respectfully urged that the judgment of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
November 19, 1948.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

No. 12046

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

TRANSCRIPT OF RECORD

Appeals From the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

No. 12046

IN THE

United States Court of Appeals

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Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

Affidavit of Irl D. Brett 18

Exhibit 1. Copy of Trust Patent 23

Answer to Petition and Order to Show Cause in re Supplemental Decree, etc 28

Appeal:

Notice of, of Lee Arenas 54

Notice of, of Lee Arenas and United States of America 56

Order Extending Time to File Record on (District Court) 55

Order Extending Time for Filing Record and Docketing, Filed August 13, 1948 (Court of Appeals) ..200

Order Extending Time for Filing Record and Docketing, Filed August 23, 1948 (Court of Appeals) ..201

Order Extending Time for Filing Record and Docketing, Filed September 15, 1948 (Court of Appeals) 202

Order Extending Time for Filing Record and Docketing, Filed September 30, 1948 (Court of Appeals) 203

Order for Enlarging Time for Filing Record on, Filed November 1, 1948 (Court of Appeals) 205

Statement of Points and Designation of Portions of Record to Be Printed on (Court of Appeals) 204

Statement of Points on (District Court) 57

Statement of Points on Which Appellant Lee Arenas Will Rely in This, (Court of Appeals) 208

Appearance of Lee Arenas 26

Page

Certificate of Clerk 58

Findings of Fact and Conclusions of Law 40

Judgment 49

Minute Order Entered February 10, 1948 39

Motion to Dismiss of United States of America, Special Appearance and 15

Names and Addresses of Attorneys 1

Notice of Appeal of Lee Arenas 54

Notice of Appeal of Lee Arenas and United States of America 56

Order Denying Dismissal 27

Order Extending Time to File Record on Appeal (District Court) 55

Order Extending Time for Filing Record and Docketing the Appeal, Filed August 13, 1948 (Court of Appeals) 200

Order Extending Time for Filing Record and Docketing the Appeal, Filed August 23, 1948 (Court of Appeals) 201

Order Extending Time for Filing Record and Docketing the Appeal, Filed September 15, 1948 (Court of Appeals) 202

Order Extending Time for Filing Record and Docketing the Appeal, Filed September 30, 1948 (Court of Appeals) 203

Order Fixing and Allowing Attorney Fees and Necessary Expenditures and Impressing Lien Upon Land of Lee Arenas as Security Therefor, and Order Substituting Attorneys for Lee Arenas (Court of Appeals) 205

Order for Enlarging Time for Filing Record on Appeal, Filed November 1, 1948 (Court of Appeals) 205

Page

Order to Show Cause 13

Petition for Supplemental Decree for Attorneys' Fees and Expenses, etc. 2

Reporter's Transcript of Proceedings, Filed September 10, 1948 59

Reporter's Transcript of Proceedings, Filed January 3, 1949 67

Petitioner's Exhibits (See Index to Exhibits)

Respondents' Exhibits (See Index to Exhibits)

Testimony on Behalf of Petitioners:

Clark, Oliver O.—

Direct examination 106

Cross-examination 107

Cosgrove, T. B.—

Direct examination 74

Cross-examination 76

Martineau, L. R., Jr.—

Direct examination 68

Testimony on Behalf of Respondents:

Arenas, Lee—

Direct examination 79

Cross-examination 84

Arenas, Marian Therese—

Direct examination 90

Cross-examination 95

Sallee, David D.—

Direct examination 100

Statement of Points and Designation of Portions of Record to Be Printed (Court of Appeals) 204

Statement of Points on Appeal (District Court) 57

Statement of Points on Which Appellant Lee Arenas Will Rely in This Appeal (Court of Appeals) 208

INDEX TO EXHIBITS

Petitioner's Exhibits:

No.		Page
4	—Interrogations (In Transcript)	117
4-A	—Statement of Facts, Civil Action No. 1321 O'C (In Transcript)	163
6	—Agreement Dated November 20, 1940, Between Lee Arenas and David D. Sallee (In Transcript)	173
6-A	—Letter Dated June 3, 1943, to David D. Sallee From the United States Department of the Interior (In Transcript)	183
7	—Power of Attorney and Contract Signed by Lee Arenas (In Transcript)	187
8	—Power of Attorney and Contract Signed by Marian Therese Arenas (In Evidence)	94
	(In Transcript)	189
14	—Report of Jos. A. Gallagher, Sr., American Right-of-Way and Appraisal Contractor, Dated December 9, 1947	191
18	—A Sample of Lee Arena's Handwriting (In Evidence)	87
19	—Causes Nos. 4401, 4402, 4403, 4404 and 4405 (In Evidence)	104
20	—List of Complaints Prepared But Not Filed (In Transcript)	193

Respondent's Exhibits:

No.		Page
D.	Letter Dated November 7, 1944, to Mr. and Mrs. Lee Arenas From David D. Sallee (In Evidence)	82
E.	File in Civil No. 3184-O'C (In Evidence)	83
I.	Report of Bernard G. Evans, Realtor and Appraiser, Dated February 7, 1948 (In Transcript)	195
K.	Letter Dated December 4, 1944, to James A. Murray From David D. Sallee (In Evidence)	100
L.	Letter Dated December 28, 1943, to Mr. and Mrs. Lee Arenas From David D. Sallee (In Evidence)	102
	(In Transcript)	196
M.	File Nos. 3185, 3187, 3188, 3189, 3190, 3192, 3193, 3196, 3197, 3198, 3199, 3200 and 3201 (In Evidence)	103
N.	Letter Dated September 24, 1943, to Mr. and Mrs. Lee Arenas From David D. Sallee (In Transcript)	198

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California
Central Division

No. 1321 O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR SUPPLEMENTAL DECREE FOR ATTORNEYS' FEES AND EXPENSES ADVANCED, FOR SALE OF PROPERTY AND FOR APPOINTMENT OF RECEIVER

The petition of John W. Preston, Oliver O. Clark and David D. Sallee, respectfully alleges:

I.

That the above entitled action was begun in this Court on the 24th day of December, 1940, and this Court rendered judgment therein on the 14th day of May, 1945, adjudging that plaintiff was entitled to trust patents to the lands allotted in 1923 and reallotted in 1927 to Lee Arenas, Guadaloupe Arenas, Francisco Arenas and Simon Arenas. That the United States of America appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said Court on the 12th day of December, 1946, affirmed that portion of said judgment adjudging that plaintiff was entitled to trust patents to the lands allotted to Lee Arenas and Guadaloupe Arenas, but decreed that plaintiff was not entitled to [2] trust patents to the lands allotted to Francisco Arenas and Simon Arenas. That thereafter plaintiff filed a petition

for a writ of certiorari to said Circuit Court of Appeals in the Supreme Court of the United States, which was denied by said Court on the 9th day of June, 1947. That the judgment of this Court, as modified by the Circuit Court of Appeals, is final.

II.

That petitioners acted as attorneys for plaintiff at his request throughout the litigation. That originally their employment was evidenced by a written contract approved by this Court and dated November 20, 1940. That said contract was later, to wit, on the 1st day of February, 1945, superseded by a new contract with petitioners, which provided as follows:

> "I hereby agree to pay my said attorneys upon a quantum meruit basis for services rendered and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family."

III.

That the plaintiff, Lee Arenas, was at all times mentioned herein, and is now, a duly enrolled and recognized member of the Agua Caliente or Palm Springs Band of Mission Indians and has at all such times resided upon the Reservation of said Band of Indians in the County of Riverside, State of California.

IV.

That by the final judgment in this action, as modified by the United States Circuit Court of Appeals for the Ninth Circuit, it was decreed that plaintiff was, and is, entitled to trust patents to the lands allotted in 1927 to Lee Arenas and to Guadaloupe Arenas, his wife, which

lands are more particularly described as follows. to wit: [3]

Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S. B. B. & M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising five (5) acres;

Parcel (C) Desert: E½ SW¼ NW¼ and SE¼ NW¼ NW¼ and SW¼ NE¼ NW¼ all in Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising forty (40) acres.

Lands Allotted to Guadaloupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S. B. B. & M., comprising two (2) acres; Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising five (5) acres;

Parcel (C) Desert: SE¼ NW¼ all in Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising forty (40) acres.

V.

That the applications for allotment, and the selections of lands for allotment, made by Lee Arenas and Guadaloupe Arenas, and the proceedings had thereon in 1927, including the certification and submission of the allotment schedule to the Secretary of the Interior by H. E. Wadsworth, the United States Special Allotting Agent at Large for the Mission Indian Reservations in California, and the certificates issued by said Special Allotting Agent to Lee Arenas and Guadaloupe Arenas, were de-

clared and adjudged by this Court to be in all respects legal and binding against the United States in the judgment rendered by this Court on the 14th day of May, 1945, and by the United States Circuit Court of Appeals for the Ninth Circuit, except as modified by the decree of said [4] Circuit Court of Appeals.

VI.

That by the decree of the United States Circuit Court of Appeals for the Ninth Circuit in this action, the date upon which the period of restriction on alienation shall begin to run, as prescribed by Section 5 of the Act of January 12, 1891 (26 Stat. L. 712), is the 9th day of May, 1927.

VII.

That all of the lands described in Paragraph IV hereof lie within or near the City of Palm Springs, County of Riverside, State of California, and taken together the said lands have a present day value in excess of One Million Dollars ($1,000,000.00). That portions of said lands, at the present time, are producing rentals of the value of about Seven Thousand Five Hundred Dollars ($7,500.00) per annum; but if said lands are properly managed and handled, they should produce in rentals a much larger sum per annum, to wit, a sum in excess of Twenty Thousand Dollars ($20,000.00).

VIII.

That petitioners have not been paid, nor have they received any sum whatsoever for their services in this action which have extended over a period of more than six years. That petitioners have advanced for necessary ex-

penses in prosecuting this action the sum of Two Hundred Fifty-eight Dollars and Sixty-seven Cents ($258.67), no part of which sum has been paid or refunded to them.

IX.

That the following is a brief description and recital of the work done and performed by the petitioners in this case, to wit:

The complaint was prepared by petitioners and filed in this action on the 24th day of December, 1940. Thereafter three amended [5] complaints were prepared and filed by petitioners. The pleadings presented extraordinary difficulties, arising out of unique and unusual legal questions and factual situations.

Two trials of the action were had in this Court; two appeals were conducted from the judgments of this Court to the Circuit Court of Appeals for the Ninth Circuit, both appeals being elaborately briefed by petitioners; two petitions for rehearing were prepared and filed by petitioners; two petitions for writs of certiorari to the Circuit Court of Appeals were prepared and filed in the Supreme Court of the United States, with supporting briefs and records, the first of which petitions was granted and the cause was thereupon rebriefed, heard and argued orally in the Supreme Court of the United States, resulting in a reversal of the first judgment herein; and the second petition for certiorari was denied by the Supreme Court on the 9th day of June, 1947.

That a more particular and chronological statement of the steps taken, and of the work done by petitioners, in this cause is as follows:

The original complaint was filed on December 24, 1940;

First Amended Complaint was filed;

Second Amended Compaint, 48 pages, filed October 27, 1941;

Motion of defendant, United States of America, to dismiss and motion for summary judgment filed November 29, 1941; the latter motion was heard on January 12, 1942 and was postponed until January 26, 1942, and was granted on March 6, 1942;

Plaintiff's Notice of Appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit was filed June 4, 1942;

The Record on Appeal was filed August 21, 1942;

Plaintiff's Opening Brief, 45 pages, and appendix thereto, 6 pages, filed November 16, 1942; [6]

Brief for United States of America filed December 11, 1942;

Plaintiff's Reply Brief, 7 pages, filed January 26, 1943;

Judgment of District Court affirmed June 30, 1943;

Petition for Rehearing filed July 23, 1943; Rehearing denied August 4, 1943;

Petition for Writ of Certiorari and supporting brief, 23 pages, with supporting record, 78 pages, filed in Supreme Court of the United States October 29, 1943;

Writ of Certiorari granted by Supreme Court December 20, 1943;

Supplemental Brief of plaintiff, 25 pages, filed February 25, 1944; cause argued by two of plaintiff's counsel in Supreme Court on March 6 and 7, 1944;

Order of Supreme Court reversing judgment below entered May 22, 1944;

Thereafter, on January 9, 1945, petitioners filed a third amended complaint for plaintiff to conform to the opinion of the Supreme Court of the United States;

The cause was prepared for trial, and the trial was had upon the issues raised by the third amended complaint and the answer thereto on January 30 and 31, 1945;

The evidence and exhibits introduced comprised approximately 600 printed pages, the exhibits alone being more than 200 pages;

Judgment for plaintiff was rendered by this Court on May 14, 1945, based upon elaborate findings of fact and conclusions of law, prepared by petitioners, consisting of 29 pages;

The United States of America made many objections to the findings, and also made motions to set them aside, requiring attendance and argument thereof by petitioners in open Court;

The United States of America appealed from the judgment to the Circuit Court of Appeals for the Ninth Circuit on August 8, 1945;

Both parties filed elaborate briefs in said Court, [7] plaintiff's brief containing 39 pages; and thereafter petitioners argued the case orally in said Court;

On December 12, 1946, the Circuit Court of Appeals made and entered its decree, affirming said judgment in part and reversing it in part, the effect of which decision was to give plaintiff the lands al-

lotted in 1927 to him and to his wife, Guadaloupe Arenas, consisting of 94 acres more or less, and denying plaintiff the lands allotted to Francisco Arenas and Simon Arenas, father and brother, respectively, of plaintiff;

Petitioners thereupon prepared and filed in said Court on January 13, 1947, a petition for a rehearing, consisting of 15 pages, and said petition was denied on January 14, 1947. Petitioners thereafter prepared a record of the case for filing in the Supreme Court of the United States, consisting of 676 printed pages, in support of a petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, which petition and supporting brief and appendix thereto, consisting of 32 pages, was, within the time allowed by law, filed in the Supreme Court of the United States, and by that Court was denied on June 9, 1947.

X.

That petitioners have not kept an accurate record of the time spent in the work done by them in the course of this litigation, but they estimate that the number of Court appearances exceeded fifty (50) and that the number of man days spent in office work on the case was from two hundred and fifty (250) to three hundred (300).

XI.

That the property awarded to plaintiff by the judgment in this action consists of four (4) acres in Section 14, Twp. 4 S., R. 4 E of San Ber. M., in the heart of the City

of Palm Springs, and ninety (90) acres in Section 26, Twp. 4 S., R. 4 E of San Ber. M., situated near the business area of said City. That said ninety [8] (90) acres is now being used as a motor court on which there are some forty (40) structures used in connection therewith. That plaintiff, Lee Arenas, is more than seventy (70) years of age, is in feeble health, and is physically unable to care for said property. That if said property were in the hands of a competent manager, the annual income therefrom would probably exceed Twenty Thousand Dollars ($20,000.00), but under the present management thereof the annual income from said property is about Seven Thousand Five Hundred Dollars ($7,500.00).

That the compensation of petitioners for services rendered in this case must be paid either from the proceeds of a sale of said property, or from a portion of the income derived therefrom in which latter event it would probably require a substantial part of such income for a period of many years to pay the compensation due to petitioners.

XII.

Petitioners allege that an amount equal to thirty-three and one-third percent (33⅓%) of the actual present day value of plaintiff's property, described in Paragraph IV hereof, would be a reasonable fee to them for the services rendered to plaintiff in securing the allotments awarded plaintiff by the judgment of this Court, as modified by the decree of the Circuit Court of Appeals.

XIII.

That petitioners are entitled to have a lien impressed upon plaintiff's property to secure the amount due them pending the full payment thereof.

XIV.

That by reason of the facts alleged in this petition a receiver should be appointed by the Court to take charge of plaintiff's said property and to manage and operate the same under the orders of the Court, so that the greatest amount of income possible may be derived therefrom, to the end that both plaintiff [9] and petitioners may receive such portions of the income as the Court may deem just and proper, the amounts paid to petitioners to be credited upon the judgment awarded by the Court to petitioners.

Wherefore, the petitioners pray:

1. That an order to show cause, directed to the United States of America and to the plaintiff, Lee Arenas, issue fixing the time and place for the hearing of this petition;

2. That petitioners have judgment against the plaintiff, Lee Arenas, for an amount equal to thirty-three and one-third per cent (33⅓%) of the present day value of the property described in Paragraph IV of this petition, as fees for the services rendered by them to plaintiff in this action, and for the further sum of Two Hundred Fifty-Eight and 67/100 Dollars ($258.67) advanced by petitioners as and for necessary expenses in prosecuting this action;

3. That it be adjudged that petitioners have a lien, and that said lien be fixed and impressed, upon the property of plaintiff, described in Paragraph IV of this peti-

tion, to secure the amounts which the Court may find to be due to petitioners, until such time as the amount adjudged by the Court to be due the petitioners is fully paid;

4. That such portion of said property as may be necessary to satisfy the judgment awarded to petitioners herein be sold according to law by a Commissioner appointed by this Court, free from any restriction upon the alienation thereof, and that the proceeds of such sale be applied to the payment of said judgment, and the balance of the proceeds of such sale, if any, be distributed to the plaintiff, or otherwise disposed of as the Court may direct;

5. That, if the Court shall not order said property sold, then and in that event that the Court appoint a receiver to take charge of, manage and operate said property, and to receive and disburse the net income therefrom to the plaintiff and to the [10] Petitioners in such manner and in such amounts and at such times as the Court may order and direct;

6. That Petitioners have such other and further relief as to the Court may seem just and proper.

JOHN W. PRESTON
OLIVER O. CLARK
DAVID D. SALLEE
By John W. Preston
Petitioners [11]

Received copy of the within Petition this 21 day of October, 1947. Irl D. Brett, by R. J.

[Endorsed]: Filed Oct. 24, 1947. Edmund L. Smith, Clerk. [12]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

Upon reading and filing the Petition of John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., for a supplemental decree for the allowance of attorneys' fees for services rendered by them to the above named plaintiff, Lee Arenas, and for expenses advanced by them for said plaintiff, in the above entitled cause, and for the sale of a sufficient portion of the lands allotted to said plaintiff to pay the amount of attorneys' fees that shall be awarded by the Court to said Petitioners and expenses advanced by them on behalf of said plaintiff, and it appearing to the satisfaction of the Court therefrom and also from the judgment heretofore rendered in this cause that the Court retained "jurisdiction over this action and the subject matter thereof for the purpose of adjudicating the reasonable sums that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof, [13] and for the purpose of making all necessary and proper orders, judgments and decrees for the securing and payment of all such sums so found due and owing by the plaintiff to said attorneys," that this is a proper case for the issuance of an order to show cause to the plaintiff, Lee Arenas, to appear in this Court and answer to said petition;

Now, Therefore, It Is Hereby Ordered that the plaintiff, Lee Arenas, be and appear before this Court in the Wm. C. Mathes courtroom of the Honorable ~~J. F. T. O'Connor~~, one of the Judges thereof, at the hour of 10 A. M., on the 16 day of December, 1947, then and there to show cause, if any he has, why attorneys' fees and expenses advanced by them should not be allowed and paid to the Petitioners, John W. Preston, Oliver O. Clark and David D. Sallee, Esqs., in the amounts prayed for and for other relief as set forth in their said Petition.

It Is Further Ordered that a copy of the Petition of and this order John W. Preston, Oliver O. Clark and David D. Sallee ^ be served on the plaintiff, Lee Arenas, not later than the 15 day of November, 1947. [Mathes, J. 10/24/47]

Dated this 24 day of October, 1947.

WM. C. MATHES
Judge

[Endorsed]: Filed Oct. 24, 1947. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

SPECIAL APPEARANCE OF, AND MOTION TO DISMISS BY, THE UNITED STATES OF AMERICA

Comes now the United States of America and appearing specially and solely for the purpose of this motion to dismiss and not otherwise, moves this Honorable Court to dismiss the Order to Show Cause in the above numbered and entitled proceedings heretofore noticed before this Court for 10:00 A. M. on December 16, 1947, in the courtroom of the Honorable Wm. C. Mathes, one of the Judges thereof, in so far as said Order to Show Cause, and the petition upon which it is based, are directed toward the procuring of an order, or orders, by this Court:

1. Affecting lands, the title to which is vested in the United States, to-wit, the lands described in paragraph IV of said petition.

2. Directing the sale of, or the sequestration of, said lands.

3. Appointing a receiver to take charge of, or to manage, or to operate, or in any manner to affect and supersede the lawful supervision and regulation of said lands by the United States, by and through the Secretary of the Interior of the United States. [15]

4. Appropriating or sequestering, or otherwise affecting or disposing of the income from said lands, except as consented to and approved by the United States through the Secretary of the Interior of the United States.

5. Appropriating or sequestering the income from any business conducted upon said lands except as consented to and approved by the United States through the Secretary of the Interior of the United States.

6. Making any order herein, the effect of which would be to supersede the authority of the Secretary of the Interior of the United States, to determine what, if any, business ventures could be conducted upon said lands during the time title thereto is vested in the United States, or who may manage and control the same, or the effect of which would be to supersede, limit or impair present existing or future regulations of business activities upon such lands by the Secretary of the Interior of the United States.

7. Imposing, directly or indirectly, a judgment for costs, or attorney fees, or both, against property the title to which is vested in, or the supervision and control of which is exclusively entrusted to, the United States.

Said motion is made upon the following grounds:

1. That the United States has not submitted to the jurisdiction of this Court as to any of the foregoing matters; that this Court can obtain no jurisdiction over the United States as to such matters without its consent and that the United States is an indispensable party, as respondent to the petition and Order to Show Cause, in so far as they are directed to the foregoing matters.

2. That it is the established law of this case, by the final judgment of the Circuit Court of Appeals for the Ninth Circuit, that by consenting to the suit to establish

the rights of Lee Arenas to a trust patent to the lands involved in this proceeding, as provided in Title 25, Section 345, U. S. C., the United States has not consented to the imposition [16] of liability for costs or other expenses of litigation against it.

Said motion will be based upon the affidavit of Irl D. Brett, Esq., which is served herewith, together with the records and files in this proceeding and the statutory and case law applying thereto.

Dated: December 16th, 1947.

JAMES M. CARTER
United States Attorney

IRL D. BRETT
Special Assistant to the Attorney General

By Irl D. Brett

Attorneys for Defendant United States of America

Received copy of the within, also affidavit, this Dec. 16, 1947. John W. Preston.

Received copy Dec. 16, 1947. Jerry Giesler, Meyer M. Willner, H. L. Thompson, Attys. for Lee Arenas.

[Endorsed]: Filed Dec. 16, 1947. Edmund L. Smith, Clerk. [17]

[Title of District Court and Cause]

AFFIDAVIT OF IRL D. BRETT

State of California
County of Los Angeles—ss.

Irl D. Brett, being first duly sworn, says:

I am a Special Assistant to the Attorney General of the United States, Lands Division, Department of Justice, assigned to the office of James M. Carter, United States Attorney, at Los Angeles, and in such capacity am charged with the handling of the special appearance of, and motion to dismiss by, the United States of America in the above numbered and entitled proceeding in respect to the Petition for Supplemental Decree and the Order to Show Cause based thereon, which Order is returnable before this court on December 16, 1947, at 10 o'clock a. m.

That it appears from the Petition, and particularly from paragraphs IV and XI thereof, that the property which is the subject matter of said Petition and Order to Show Cause consists of Lots 46 and 47 in Section 14, Township 4 South, Range 4 East, S.B.B. & M., and certain portions of Section 26, Township 4 South, Range 4 East, S.B.B. & M., together with the income from a business [18] operation (motor court) located on a portion thereof; that by a conveyance executed by Grover Cleveland, President of the United States of America, dated May 14, 1896, and recorded in the General Land Office at Washington, D. C.

in Volume 21, pages 231 to 233, inclusive, all of Sections 14 and 26, Township 4 South, Range 4 East, S.B.B. & M. were declared to be held by the United States of America in trust for the sole use and benefit of the Agua Caliente Band or Village of Mission Indians; that a true and correct copy of said Trust Patent is annexed to this affidavit, marked Exhibit 1, and by such reference incorporated herein as if herein set out in full; that at all times subsequent to said date and to and including the date of this affidavit, said lands have been owned by the United States of America and held subject to said Trust Patent.

That it appears from the Petition for Supplemental Decree that it is based upon the provisions of a reservation in the Judgment made by the Honorable J. F. T. O'Connor, one of the Judges of this court, dated and entered on May 14, 1945 in Civil Order Book 32 at page 581, and identified and designated as paragraph VIII, which reservation is repeated and set forth verbatim in the Order to Show Cause, commencing on page 1, line 18, and ending on page 2, line 3; that the records, files, pleadings, briefs, and decisions rendered in connection with this proceeding disclose that no prayer for such reserved jurisdiction appeared in the original Complaint; that the original Judgment was in favor of the United States and was a summary judgment determining that the plaintiff was not entitled to any relief as against the United States; that the Order and Decree of the United States Supreme Court did not include or refer to such reservation of jurisdiction nor to the remedy sought by the Petition and Order to Show Cause (322

U. S. 419); that the first time such jurisdiction was prayed for was in paragraph 3 of the prayer of the Third Amended Complaint, in which plaintiff prayed:

> "3. That plaintiff have such other and further relief as justice and equity may require, including the costs of this action."

That the Answer by the United States to the Third Amended Complaint objected to and denied every form of relief as sought by plaintiff and concluded with a request for dismissal with costs; that in Finding XLIV the Court found: [19]

> "XLIV.
>
> "That plaintiff in this action is what is known as a restricted Indian and as such is without plenary power in his own right to contract for the payment of Court costs, attorneys' fees and other expenses necessarily incurred in the prosecution of this litigation and the Court, not having as yet determined the issues that will arise in this behalf, finds that this is a proper cause within which to retain jurisdiction for the purpose of determining and disposing of all issues which may arise concerning said subject matter."

And in general Conclusion of Law No. XVII, the Court concluded:

> "That the several attorneys for the plaintiff in this action have incurred expenses of considerable magnitude and have performed valuable services for the plaintiff in this action; that the power of plaintiff to

contract for the payment of such expenses and for such services is restricted by law; that the present cause is a proper one for the Court to retain jurisdiction of the subject matter thereof for the purpose of hearing and determining all issues that appertain to the determination of the amount of such expenses and the value of such services and for the payment and discharge thereof and for such orders in connection therewith as the Court of equity may deem meet and proper."

That said Finding and Conclusion were attacked by the United States, which sought to strike the same in a document dated June 9, 1945, filed June 11, 1945, and entitled "Motion to Vacate Judgment and Conclusions and to Amend Findings of Fact"; that said motion was overruled by the court and paragraph VIII of the Judgment was included therein, as hereinabove alleged; that upon appeal from said judgment on December 20, 1945, the United States filed its Statement of Points on Appeal and included therein as Point 8 the following, to-wit: [20]

"8. That the District Court erred in holding that appellee is restricted by law from contracting for the payment of legal services and that the Court retained jurisdiction over this action for the purpose of adjudicating the reasonable sum that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof."

That affiant does not have available to him the briefs upon appeal in the Circuit Court of Appeals upon the second appeal, which was from the judgment in which this reservation of jurisdiction is contained; but in the decision of the Circuit Court in the case of United States of America vs. Lee Arenas, 158 F. (2d) 730, at page 753, the Circuit Court expressly refers to the objections by the United States to said reserved jurisdiction, and holds that such reservation does not affect the United States because by consenting to this action under Title 25, Section 345, U. S. C. A., the United States has not consented to the imposition of liability for costs or other expenses as against it, and that there is "neither internal nor external evidence that the Judgment reflects any such indication"; that neither in the Petition for Writ of Certiorari filed by Lee Arenas, nor the Conditional Cross-Petition filed by the United States, was any issue raised, argued, or submitted with respect to the reserved jurisdiction as set forth in paragraph VIII of said Judgment.

IRL D. BRETT
Affiant

Subscribed and sworn to before me this 16th day of December, 1947.

(Seal) EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California

By Edw. F. Drew,
Deputy [21]

EXHIBIT 1

UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting:

Whereas it is provided by an Act of Congress entitled "An Act for the relief of the Mission Indians of the State of California" approved January twelfth Anno Domini one thousand eight hundred and ninety one (26 Stats 712) that "the Secretary of the Interior shall appoint three disinterested persons as Commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California upon reservations which shall be secured to them.

"Section 2. That it shall be the duty of said Commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the Secretary of the Interior."

"Section 3. That the Commissioners upon the completion of their duties shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the Commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented subject to the provisions of section 4 of this act, for the period of twenty-five years in trust, for the sole use and benefit of the band or village to which it is issued, and

that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village discharged of said trust and free of all charges or incumbrance whatsoever."

And Whereas it appears by a letter dated October twenty-sixth, eighteen hundred and ninety-five from the Commissioner of Indian Affairs, and an order dated October twenty-eighth eighteen hundred and ninety-five from the Secretary of the Interior that a selection has been made by the Commissioners appointed [22] and acting under said act of Congress of January twelfth eighteen hundred and ninety one for the Agua Caliente band or village of Mission Indians covering sections twelve, fourteen, twenty-two, twenty-four, twenty-six and thirty-four of township four South, range four east, of the San Bernardino Meridian in the State of California containing three thousand eight hundred and forty four acres and eighty hundredths of an acre.

Now Know Ye, That the United States of America in consideration of the premises and in accordance with the provisions of the said Act of Congress approved January twelfth eighteen hundred and ninety-one, hereby declares that it does and will hold the said tracts of land selected as aforesaid (subject to all the restrictions and conditions contained in the said act of Congress of January 12, 1891) for the period of twenty-five years in trust for the sole use and benefit of the said Agua Caliente Band or Village of Mission Indians according to the laws of California and at the expiration of said period the United States will convey the same, or the remaining portion not patented to individuals, by patent to said Agua Caliente Band or Village of Mission Indians as aforesaid in fee simple dis-

charged of said trust and free of all charge or incumbrance whatsoever.

Provided, That when patents are issued under the fifth section of said act of January twelfth, eighteen hundred and ninety-one in favor of individual Indians for lands covered by this patent they will override (to the extent of the land covered thereby) this patent, and will separate the individual allotment from the lands left in common, and there is reserved from the lands hereby held in trust for said Agua Caliente Band or Village of Mission Indians a right of way thereon, for ditches or canals, constructed by the authority of the United States.

In testimony whereof, I, Grover Cleveland, President of the United States of America have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed. [23]

(Seal) Given under my hand at the City of Washington this fourteenth day of May in the year of our Lord one thousand eight hundred and ninety six and of the Independence of the United States the one hundred and twentieth.

By the President, Grover Cleveland

By M. McKean, Secretary

L.Q.C. Lamar Recorder of the General Land Office
Recorded Vol. 21 pp 231 to 233 inclusive

Received copy of this affidavit December 16, 1947. Jerry Giesler, H. L. Thompson, Meyer M. Willner, Attys. for Lee Arenas; John W. Preston, Atty. for Petitioners.

[Endorsed]: Filed Dec. 16, 1947. Edmund L. Smith, Clerk. [24]

[Title of District Court and Cause]

APPEARANCE

The undersigned hereby appear in the above entitled matter as attorneys for the plaintiff in connection only with the Order to Show Cause and Petition for Supplemental Decree for Attorneys' Fees and Expenses Advanced, for Sale of Property and for Appointment of Receiver, which petition was filed by John W. Preston, Oliver O. Clark and David D. Sallee.

Dated at Los Angeles, California, December 18, 1947.

JERRY GIESLER
MEYER M. WILLNER
H. L. THOMPSON
By Meyer M. Willner
Attorneys for Plaintiff

Received copy of the within appearance this 22nd day of December, 1947. James M. Carter, Irl D. Brett, Attorneys for United States.

This Dec. 22, 1947. John W. Preston, one of Attys. for Plaintiff.

[Endorsed]: Filed Dec. 22, 1947. Edmund L. Smith, Clerk. [25]

In the District Court of the United States
Southern District of California
Central Division

No. 1321 O'C—Civil

LEE ARENAS, Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING DISMISSAL

The Petition for Supplemental Decree in the above entitled cause for Attorneys' fees and expenses advanced by Messrs. John W. Preston, Oliver O. Clark and David D. Sallee, attorneys for plaintiff Lee Arenas, came on to be heard on the 22nd day of December, 1947, upon the motion of the United States of America to dismiss said petition as to said defendant, filed by its said attorneys in said action, and the Court having heard the arguments of counsel for the United States and also for the Petitioners, and being fully advised in the premises, does hereby find that said motion to dismiss is not well taken and should be denied, without prejudice.

Wherefore, It is Ordered, Adjudged and Decreed that said motion to dismiss be and the same is hereby denied without prejudice.

~~Dated: December 24, 1947.~~

Done in Open Court Dec. 22, 1947.

WM. C. MATHES
Judge

Approved as to Form: Irl D. Brett for James M. Carter, United States Attorney.

Judgment entered Dec. 31, 1947. Docketed Dec. 31, 1947. C. O. Book 47, page 630. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed Dec. 31, 1947. Edmund L. Smith, Clerk. [26]

[Title of District Court and Cause]

ANSWER TO PETITION AND ORDER TO SHOW CAUSE IN RE SUPPLEMENTAL DECREE FOR ATTORNEYS' FEES AND EXPENSES ADVANCED FOR SALE OF PROPERTY, AND FOR APPOINTMENT OF RECEIVER

Comes now the United States of America, by direction of the Attorney General of the United States, and appearing specially in its own behalf, and appearing generally in its capacity as Guardian for plaintiff and respondent, Lee Arenas, and by virtue of its obligation to represent and defend said plaintiff and respondent, in answer to the petition of John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore filed on October 24, 1947, and the Order to Show Cause directed to plaintiff and respondent, Lee Arenas, dated October 24, 1947, and reserving the objections heretofore set forth in the special appearance of, and motions to dismiss by, the United States of America, heretofore served and filed on December 16, 1947, which motion was denied without prejudice by [27] an Order of this Court dated December 24, 1947, at page 630 of Judgments, denies and alleges as follows:

I.

Alleges that the United States, by reason of the helpless and dependent character of the Palm Springs Band of Mission Indians, is the guardian of, and has the exclusive control of, their property, including the lands and premises described in paragraph IV of the petition, and, by virtue thereof, there is imposed upon it the duty to do whatever matter be necessary for their guidance, welfare, and protection, and, particularly, for the guidance, welfare, de-

fense and protection of Lee Arenas in connection with the lands aforesaid.

II.

That, to grant that portion of the petition which seeks to impose a lien upon and to involuntarily alienate the title to such restricted property; to interfere with, control, or otherwise affect or direct the management and control thereof; to impose judicial control upon the supervision and control of said property in said Indian reservation by the Secretary of the Interior of the United States and appoint a Receiver for said restricted property, except with the consent and approval of the Secretary of the Interior, is a violation of the governmental rights of the United States. That Lee Arenas is a restricted Indian ward of the United States, and by virtue of the Acts of Congress the property in controversy is restricted so that no interest in the property may in any way be encumbered or alienated without the consent of the Secretary of the Interior or unless the restrictions against the alienation are removed by the Secretary of the Interior; that it is in the governmental interest of the United States to enforce the restrictions against alienation imposed by Congress.

III.

That these answering respondents deny the allegations contained in paragraph II of said petition, except that it is admitted that a written document entitled "Agreement," dated November 20, 1940, was [28] signed by David D. Sallee, and appears to bear the signature of Lee Arenas; that Lee Arenas is aged and infirm and has stated that he does not recall signing such document; that upon such ground these answering respondents deny that he signed the same. In this connection these respondents affirma-

tively allege that such agreement if executed by Lee Arenas, was solely between David D. Sallee and Lee Arenas, and provided, by its express terms, inter alia: [29]

"That the Party of the First Part hereby contracts with, retains and employs the Party of the Second Part as attorney in the matters hereinafter mentioned, subject to the approval of the Commissioner of Indian Affairs, and the Secretary of the Interior, pursuant to Section 2103 of the Revised Statutes of the United States of America.

"It Is Agreed that the said attorney is hereby authorized to associate with him in said work hereunder such assistants, including attorneys, as he may select, provided that the Government of the United States shall not be liable for any expenses;

"It Is Further Understood that in event the Party of the Second part, or his associates who are actually associated in the litigation and investigation as aforesaid, shall advance any necessary expenses, they shall be reimbursed by the Party of the First Part, from the property recovered, such actual expenses as are strictly necessary or proper in connection with the printing of briefs, court costs for proceedings and other similar matters, and to include such actual and necessary traveling expenses, clerical hire, stenographic expense, and the like as may be properly required for the prosecution of said case, or cases; provided that all such expenditures shall be itemized and verified by the Party of the Second Part, and shall be accompanied by proper vouchers, and shall be paid only upon the approval of the Secretary of the Interior, or an officer designated by him who shall certify the same.

"It Is Further Understood and Agreed by and between the parties to this Agreement, that in event of a misunderstanding as regards the manner in which the compensation to the Party of the Second Part from the Party of the First Part shall be paid; and Trust Patents or receipts have been issued, and in [30] that event the Party of the First Part shall thereupon make application for a removal of restrictions upon sufficient of the premises to be sold, and from the proceeds of said sale or sales to pay said Party of the Second Part; that in event it is not for the best interests of the parties hereto to sell said land, the removal of restrictions shall be applied for upon properties coming to the First Party, as selected by said Second Party, upon the basis of one-tenth of the property—That is to say, Second Party shall select one property that does not exceed ten per cent of the total value of all properties, and that First Party shall select nine properties that do not exceed ninety per cent of the total value of said properties, and continue to make such selections until all property shall have been selected. That the property selected by the Second Party shall then be deeded to said Second Party, subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

"And It Is Further Understood and agreed that no assignment of this contract, or any interest therein, shall be made without the consent previously obtained from the Commissioner of Indian Affairs, and the Secretary of the Interior, and that such assignment if made must comply with Section 2106 of the Revised Statutes of the United States."

That although such agreement was tendered to the Commissioner of Indian Affairs and the Secretary of the Interior, it was not approved and, to the contrary, was expressly disapproved.

These respondents further allege in respect to said alleged agreement of November 20, 1940, that none of the conditions precedent heretofore quoted therefrom in this paragraph have been complied with by petitioners.

Further answering paragraph II of said Petition, these respondents deny that a new contract was entered into on February 1, 1945, be- [31] tween Lee Arenas and these petitioners which superseded the alleged agreement of November 20, 1940. In this connection these respondents allege that if any such agreement was entered into on February 1, 1945, it was wholly prospective and contains no provision whatsoever with respect to the alleged agreement of November 20, 1940.

These respondents admit that a document dated February 1, 1945, which Lee Arenas now states he has no recollection of executing, does contain the clause which is quoted and set forth in paragraph II of the petition on page 2, lines 14 to 18, inclusive; but further allege that said text is immediately followed, limited, and conditioned by the following sentence, to-wit:

> "All to be subject to the rules and regulations of the Department of the Interior";

that, if such agreement dated February 1, 1945, was made and is in effect, the conditions precedent, to-wit, that such agreement was to be subject to the rules and regulations of the Department of the Interior, have not been fulfilled, met, or tendered by petitioners.

Further answering paragraph II of said Petition, these respondents allege that at and prior to the time that the purported agreement dated February 1, 1945, was signed by respondent Lee Arenas, petitioners were obligated and bound by a firm contract, to-wit, the contract dated November 20, 1940, as follows:

> "And it is also understood and agreed that the said attorney at law, (David D. Sallee), and his associates, if any, shall pursue the litigation in question to and through the court of final resort, unless authorized by the Secretary of the Interior to terminate the proceedings at an intermediate stage thereof."

That no such authorization was requested or obtained from the Secretary of the Interior; that the circumstances of this litigation were such that at the date when the agreement of November 20, 1940 was executed, and at all times thereafter, to and including February 1, 1945, these petition- [32] ers and each of them then knew that the remedy then sought by respondent Lee Arenas and to perform which petitioner David D. Sallee had obligated himself, and his associates, would, of necessity, require a petition for certiorari in the Supreme Court of the United States, preparation of the necessary briefs and presentation of the necessary argument in support thereof and in support of an appeal in said Court if certiorari were granted, together with the prosecution through a court of final resort following the decision of the Supreme Court if such decision were favorable to respondent Lee Arenas and resulted in a reversal of the decision theretofore made in the so-called St. Marie case. That it was represented to respondent Lee Arenas, that said contract of November 20, 1940, did not include the obligations aforesaid and

that the performance of services following the decision of the United States Circuit Court of Appeals after the first judgment in this proceeding, was an additional service which would justify and require additional compensation and, also, that at the time of the negotiation leading up to the execution of the document dated February 1, 1945, respondent Lee Arenas, was aged and infirm, was then being represented as counsel by these petitioners and each of them, and did not have or receive independent legal advice as to the terms, provisions and obligations of the agreement dated November 20, 1940, particularly that said agreement specifically covered and provided for the compensation to be received by said attorney for pursuing the litigation through the court of final resort. That by reason of the aforesaid the agreement contained in the document dated February 1, 1945, is null and void.

IV.

Answering paragraph VI of the said petition, these respondents allege that the period of restriction on alienation is subject to extension annually by the President of the United States, for a period not to exceed twenty-five (25) years, and that each President of the United States, since the effective date of the act, has extended such period of restriction on alienation annually for an additional period of twenty- [33] five (25) years. That such authority is vested in the President under the provisions of Title 25, Section 391, U. S. C.

V.

Respondents deny the allegations contained in paragraph VII of said petition and allege that by reason of the restrictions upon alienation, and the limited right of user under existing laws, and the uncertainty as to when, if at

all, the lands described in paragraph IV of the petition will ever be released from such restrictions, said lands have a value which is problematical and highly speculative, the exact amount of which is not now known to respondents.

That, as to the rentals, by reason of existing laws and restrictions upon the use of the premises and upon the character of permit which can be granted in respect of such use, the rentals now being produced are the full amount that could be produced therefrom and the production of any increased rental or income must necessarily await the change or modification of such existing laws and restrictions upon the use thereof. That the time when such change or modification will be made and the nature and extent thereof and the effect thereof upon the possibilities for an increase of income from said restricted lands is, at this time, wholly conjectural and speculative.

VI.

Answering paragraph VIII, respondents have no information or belief respecting the allegations contained in paragraph VIII of the petition, and upon such ground deny the same.

Respondents further allege that if said amount has been expended by petitioners and has not been repaid, petitioners have not furnished proper items, vouchers, and verified and submitted them to the Secretary of the Interior or to any officer designated by him, for his approval and certification. [34]

VII.

Answering paragraph X of the petition, these respondents deny the allegations contained therein.

VIII.

Answering paragraph XI, these respondents deny that portion thereof which alleges that the annual income could be increased in the hands of a competent manager; and further allege that this Court has no jurisdiction or control over the operation and management of such restricted property, but that the exclusive jurisdiction, control and management thereof is vested by Congress in the United States.

Respondents further deny that any portion of petitioners' compensation may be paid from the proceeds of a sale of said property or from a portion of the income derived therefrom except and until the restrictions now existing upon the alienation thereof have been removed, and that this Court does not have jurisdiction to order or require a sale or other alienation of, or the encumbrance of, said restricted real estate or the income derived therefrom.

IX.

Answering paragraphs XII, XIII, and XIV, respondents deny each and every allegation therein; but respondents admit that petitioners have performed valuable services for Lee Arenas and are entitled to recover a money judgment against him to the extent of ten per cent (10%) of the amount of the reasonable value of the restricted lands described in paragraph IV of the petition as of the date of the completion of this litigation when, but only when, they have completed and fulfilled such agreements, if any, as they may have made with him, including all conditions precedent, as therein provided; that they are not entitled, and this Court has no jurisdiction to enter an order, judgment, or decree in their favor by which the

lands described in paragraph IV of said petition, and the income derived therefrom, are alienated, transferred or encumbered, or by which order, judgment, or decree said lands or income is taken [35] from or placed beyond the exclusive management, operation and control of the United States of America by and through the Secretary of the Interior.

Wherefore, respondents pray:

1. That this Court find and determine that the Petition and Order to Show Cause are premature, in that petitioners have not fully performed and complied with the conditions precedent of their employment, and have not completed the work to be done by them, and that said Order to Show Cause be discharged;

2. That, if it be held that petitioners are entitled to any relief, such relief be limited to the Contract fee fixed in the agreement dated November 20, 1940, fixed in money and as a personal money judgment against respondent Lee Arenas only;

3. That, if it be determined that the agreement dated November 20, 1940, has been superseded by the agreement dated February 1, 1945, that the amount and value of the property described in paragraph IV of the Petition be fixed and determined as of February 10, 1948, or such other date as the Court shall determine as the date when petitioners shall have fully completed the obligations on their part to be performed, fixed in money and as a personal money judgment against respondent Lee Arenas only;

4. That it be ordered and decreed that petitioners are not entitled to affix a lien upon, or to an order for the disposition, alienation or sale of the restricted real property or the income derived therefrom and are not entitled to the appointment of a receiver or other ancillary relief as against said restricted property;

5. That the issues as to the value of the interest of Lee Arenas in the restricted property, be tried to a jury;

6. If the Court shall hold and determine that petitioners are to be paid on a different basis than the contract fee as provided in the agreement of November 20, 1940, that the reasonable value of the services of petitioners performed for respondent Lee Arenas in this proceed-[36] ing, be tried to a jury.

Dated: February 9th, 1948.

JAMES M. CARTER
United States Attorney

IRL D. BRETT
Special Assistant to the Attorney General

By Irl D. Brett

Attorneys for Respondents, United States of America and Lee Arenas

Received copy of the within answer this 9th day of February, 1948. John W. Preston [RH], David D. Sallee [RH], Oliver O. Clark [RH].

[Endorsed]: Filed Feb. 9, 1948. Edmund L. Smith, Clerk. [37]

[Minutes: Tuesday, February 10, 1948]

Present: The Honorable Wm. C. Mathes, District Judge.

For hearing on return of order of Oct. 24, 1947, to show cause why attorneys' fees and expenses should not be allowed; John W. Preston, Oliver O. Clark, and David D. Sallee, Esqs., appearing as counsel for plaintiff; Irl D. Brett, Spec. Ass't to Att'y Gen'l, appearing as counsel for Gov't, and in this proceeding for Lee Arenas;

On Motion of Meyer Wellner, it is ordered that H. L. Thompson may withdraw and John J. Taheny, Esq., is substituted as counsel for Def't Arenas, and associated with Horace A. Diebert, Esq., in this case on motion of Mr. Taheny;

Attorney Brett makes a statement and files stipulation and interrogatories. Attorney Brett waives jury trial. Attorney Taheny makes a statement and says he feels a jury should not be requested and assuming the Def't Arenas is entitled to a jury trial, waives same.

Interrogatories filed Feb. 10, 1948, and stipulations are offered in evidence. Petitioner's Ex. 1, 2, 3, 4, 4-A, 5, 6, 6-A, 7, and 9 are allowed in evidence, and Petitioner's Ex. 8 is marked for ident.

At 11:45 A. M. Court declares a recess in these proceedings to Feb. 11, 1948, 9:30 A. M. [38]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly petitioned the above entitled Court that a supplemental decree be made and entered herein, which should determine the amount of their reasonable compensation for services rendered to the plaintiff herein, and the amount of costs and expenses paid by said petitioners on behalf of the plaintiff herein, and for which reimbursement has not been made, and fixing the time for the payment thereof, and the manner of such payment, and the security thereof, and for appropriate ancillary relief in respect thereof, and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein, of the time and place of such hearing, before the above entitled Court, Honorable W. C. Mathes, judge thereof presiding, in the courtroom of said Court in the United States Post Office [39] Building at the northeast corner of Temple and Spring Streets, in the City of Los Angeles, County of Los Angeles, State of California, and on the 12th and 20th of February, 1948, and the 8, 29, 30, and 31st days of March, 1948;

And Be It Further Remembered that upon said hearing the Petitioners appeared personally and upon their own behalf; the United States of America appeared specially by Irl D. Brett, as Special Assistant to the Attorney General, Lands Division, Department of Justice of the United States of America, and Lee Arenas, the plaintiff

herein appeared personally, and by said Irl D. Brett as such Special Assistant to the Attorney General, and by John J. Tahaney, an Attorney at Law and Solicitor;

Whereupon evidence, both oral and documentary, was offered and received, and the cause was argued and submitted to the Court for decision, and

Now, Therefore, the Court being fully advised in the premises, makes these its findings of fact and conclusions of law herein, to wit:

Findings of Fact

I.

That Petitioners, Oliver O. Clark and David D. Sallee, were originally employed by plaintiff, Lee Arenas, as evidenced by a contract in writing of date November 20th, 1940, in evidence here as Petitioners' Exhibit No. 6, to represent him in all matters respecting an allotment of lands to him in the Palm Springs Reservation of the Agua Caliente Band of Mission Indians, in Riverside County, California.

II.

That said contract remained in force until about September 7th, 1943, at which time it was orally agreed between plaintiff [40] and said petitioners that said John W. Preston would be associated with said Oliver O. Clark and David D. Sallee in the performance thereafter of the duties undertaken by said Oliver O. Clark and David D. Sallee on behalf of plaintiff, as aforesaid, and that said petitioners should be compensated upon a quantum meruit basis for their said services, and should be reimbursed for all expenses incurred by them in behalf of plaintiff and members of his family. That said agreement is evi-

denced by a writing, which is petitioners' Exhibit Number 7 herein, and which was executed on or about February 1st, 1945, and continued in force thereafter.

III.

That said petitioners, prior to the filing of their petition herein, fully performed, and completed, the duties of their said employment.

IV.

That each of the allegations contained in Paragraphs I, [Mathes, J.] of the Petition herein III, IV, V, VI, VIII, IX and X, ^ is true.

V.

That the lands allotted to said Lee Arenas, as aforesaid, and said Lee Arenas, are entitled to receive for domestic, agricultural and horticultural uses upon said lands, water from Tahquitz and Andreas Canyons in the mountains above said lands, proportionately with all other members of said Mission Band of Indians in respect of the land within said Indian reservation, and that the water available from said sources, for said purposes, is reasonable adequate therefor.

VI.

That the reasonable market value of said lands allotted [41] to said Lee Arenas, as aforesaid, and of said water rights, is uncertain, but, nevertheless, is very substantial.

VII.

That the petitioners Oliver O. Clark and David D. Sallee rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above entitled cause for which said petitioners

[Mathes, J.] the reasonable value thereof; which reasonable value was and is

are entitled to receive as compensation ^ ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927, and of said water rights incident to said lands, being the same lands described in Paragraph IV of the Petition filed by the petitioners herein as follows:

"Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B. & M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising five (5) acres;

Parcel (C) Desert: E½ SW¼ NW¼ and SE¼ NW¼ NW¼ and SW¼ NE¼ NW¼ all in Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising forty (40) acres.

"Lands Allotted to Guadaloupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B. & M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising five (5) acres;

Parcel (C) Desert: SE¼ NW¼ all in Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising forty (40) acres." [42]

VIII.

That the petitioner John W. Preston rendered and performed legal services for and on behalf of, and at the request of, and by agreement with the plaintiff in the above entitled cause for which said petitioner is entitled

[Mathes, J.] the reasonable value thereof; which reasonable value was and is

to receive as compensation ∧ twelve and one-half per cent (12½%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927, and of said water rights incident to said lands, being the same lands described in Paragraph IV of the Petition herein and in Paragraph VII of these Findings; and that said petitioner John W. Preston has advanced and paid out for said plaintiff, as necessary costs and expenses of said action sums aggregating Two Hundred Fifty-eight and 67/100 Dollars ($258.67) for which said petitioner is entitled to reimbursement from said plaintiff.

IX.

That no part of the compensation, costs and expenses mentioned and described in Paragraphs VII and VIII of these Findings has been paid, and all thereof is now due and unpaid.

X.

That it is reasonable and equitable that until the compensation, costs and expenses due from the plaintiff to the petitioners, as described and set forth in Paragraphs VII and VIII of these Findings, are fully paid that petitioners be secured by an equitable lien upon the whole of the

allotted lands and the water rights incident thereto and upon twenty-two and one-half per cent (22½%) of the

[Mathes, J.]

and necessary income therefrom in excess of the reasonable cost of operating said properties.

XI.

That it is reasonable and equitable that the plaintiff be [43] allowed, and have, a period of three months from and after the entry of judgment and decree herein within which to satisfy and discharge the equitable lien upon said allotted lands and the water rights incident thereto and upon that portion of the income therefrom, provided and set forth in Paragraph X, of these Findings, and that any and all further proceedings by the petitioners for the enforcement and satisfaction of said equitable lien be stayed for a period of three months from and after the entry of judgment and decree herein.

From the foregoing facts, the Court concludes:

Conclusions of Law

I.

That the petitioners Oliver O. Clark and David D. Sallee are entitled to receive as compensation for their services to the plaintiff in the above entitled action ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and of the water rights incident thereto, and to a judgment therefor.

II.

That the petitioner John W. Preston is entitled to receive as compensation for his services to the plaintiff in the above entitled action twelve and one-half per cent (12½%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and of the water rights incident thereto, and said petitioner is also entitled to reimbursement from the plaintiff the sum of Two Hundred Fifty-eight and 67/100 Dollars advanced by said petitioner as costs and expenses of suit, and to a judgment therefor.

III.

That the petitioners are entitled to an immediate, equit-
[44] able lien, to secure the payment of said compensation and to secure payment of the amount of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars ($258.67), paid by the Petitioner John W. Preston for the use and benefit of said plaintiff, upon the allotments made to Lee Arenas and Guadaloupe Arenas under the allotment proceeding of 1927 and upon all rights conferred by said allotments, and upon the entire interest and estate of Lee Arenas and his heirs in the lands embraced within said allotments, and upon the entire interest in said lands in the hands of the United States of America, and upon twenty-two and one-half per cent (22½%) of the income

[Mathes, J.]

therefrom in excess of the reasonable and necessary operating expenses of said property, until said compensation and said sum of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars ($258.67), shall be fully paid and satisfied.

IV.

That the Petitioner John W. Preston is entitled to judgment against the plaintiff for the sum of Two Hundred Fifty-Eight and sixty-seven one-hundredths Dollars ($258.67) heretofore advanced by said Petitioners for the use and benefit of said plaintiff, and is entitled to an equitable lien to secure the payment thereof upon the lands allotted to the plaintiff and upon the income therefrom until said judgment is fully paid.

V.

That the plaintiff is entitled to, and shall be allowed, a period of three months from and after the entry of judgment and decree herein within which to satisfy and discharge the equitable lien allowed and granted to the petitioners, as provided and set forth in Paragraphs III and IV of these Conclusions of Law, and that any and all further proceedings by the petitioners for the enforcement and satisfaction of said equitable lien be stayed for a period of three months from and after the entry of judgment and decree herein. [45]

VI.

That it is proper that the Court should retain jurisdiction over this action, and the parties thereto, and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method whereby, the payment of all or any part of the compensation and reimbursement for expenses hereby awarded shall be made or further secured, and in order to require and

compel the satisfaction and discharge, or enforcement, of the equitable lien awarded to the petitioners; and if necessary, for the determination of the money value of the legal services rendered and performed by the petitioners for and on behalf of the plaintiff in this action, and for the appointment of a Receiver or Commissioner to effectuate the judgment and decree herein, in accordance with the equitable jurisdiction, practice and procedure of this Court.

VII.

That the parties to this proceeding should pay their own costs, respectively, incurred herein.

Let judgment be entered accordingly.

Dated this 30 day of April, 1948.

WM. C. MATHES
Judge

Approved as to form as provided by Rule 7, April 30, 1948. Irl D. Brett, Special Assistant to the Attorney General.

Received copy of the within proposed Findings of Fact & Conclusions of Law, April 30, 1948. James M. Carter, U. S. Attorney, by Irl D. Brett, Special Asst. to the Atty. General.

[Endorsed]: Filed May 3, 1948. Edmund L. Smith, Clerk. [46]

In the District Court of the United States
Southern District of California
Central Division

No. 1321 O'C—Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Be It Remembered that John W. Preston, Oliver O. Clark, and David D. Sallee, heretofore regularly petitioned the above entitled Court that a supplemental decree be made and entered herein, which should determine the amount of their reasonable compensation for services rendered to the plaintiff herein, and the amount of costs and expenses paid by said petitioners on behalf of the plaintiff herein, and for which reimbursement has not been made, and fixing the time for the payment thereof, and the manner of such payment, and the security thereof, and for appropriate ancillary relief in respect thereof, and that said petition, to which reference is hereby made for further particulars, came on regularly for hearing after proper notice to all persons interested therein, of the time and place of such hearing, before the above entitled Court, Honorable W. C. Mathes, judge thereof presiding, in the courtroom of said Court in the United States Post Office Building at the northeast corner of Temple and Spring [47] Streets, in the City of Los Angeles, County of Los Angeles, State of California, on the 12th and 20th days of

February, 1948, and the 8, 29, 30, and 31st days of March, 1948;

And Be It Further Remembered that upon said hearing the petitioners appeared personally and upon their own behalf; the United States of America appeared by Irl D. Brett as Special Assistant to the Attorney General, Lands Division, Department of Justice of the United States of America, and Lee Arenas, the plaintiff herein*g,* appeared personally, and by said Irl D. Brett as such Special Assistant to the Attorney General, and by John J. Tehaney, as Attorney at Law and Solicitor;

Whereupon evidence both oral and documentary, was offered and received, and the cause was argued and submitted to the Court for decision, and the Court having made and filed its findings of fact and conclusions of law herein and ordered judgment in accordance therewith.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

First: That the petitioner John W. Preston, have and [Mathes, J.] as recover from the plaintiff, Lee Arenas, ∧ reasonable compensation for the services rendered by said petitioner for and on behalf of said plaintiff in the above entitled action, twelve and one-half per cent (12½%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and of the water rights incident to said lands, the same being more particularly described as follows, to wit:

"Lands Allotted to Lee Arenas:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S.B.B. & M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising five (5) acres; [48]

Parcel (C) Desert: E½ SW¼ NW¼ and SE¼ NW¼ NW¼ and SW¼ NE¼ NW¼ all in Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising forty (40) acres.

"Lands Allotted to Guadaloupe Arenas:

Parcel (a) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S.B.B. & M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising five (5) acres;

Parcel (C) Desert: SE¼ NW¼ all in Section 26, Township 4 South, Range 4 East, S.B.B. & M., comprising forty (40) acres."

Second: That said petitioner John W. Preston have and recover from the plaintiff, Lee Arenas, the sum of Two Hundred Fifty-eight and 67/100 Dollars ($258.67) heretofore paid by said petitioner for the use and benefit of said plaintiff in said action.

Third: That the petitioners Oliver O. Clark and David D. Sallee have and recover from the plaintiff, Lee Arenas, as reasonable compensation for the services rendered by said petitioners for and on behalf of said plaintiff in said action, ten per cent (10%) of the value of said allotted lands and of the water rights incident thereto.

Fourth: That the payment of the compensation awarded hereby to said petitioners John W. Preston, Oliver O.

Clark and David D. Sallee, and the payment of said sum of Two Hundred Fifty-eight and 67/100 Dollars ($258.67) heretofore paid by said petitioner John W. Preston for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the allotments made to Lee Arenas and Guadaloupe Arenas under the allotment proceedings of 1927 and upon all rights conferred by said allotments, and upon the entire interest and estate of Lee [49] Arenas and his heirs in the lands em-

[Mathes, J.] , being the lands described above in paragraph "First";

braced within said allotments ^ and upon the entire interest in said lands in the hands of the United States of America, and upon twenty-two and one-half per cent (22½%) of the income therefrom in excess of the reasonable operating expenses of said property; and said equitable lien shall be and continue in full force and effect until the compensation herein and hereby awarded to said petitioners, respectively, and said sum of Two Hundred Fifty-eight and 67/100 Dollars ($258.67) paid by said petitioner John W. Preston for the use and benefit of said plaintiff, shall be fully paid and satisfied.

Fifth: That the plaintiff be, and he hereby is, allowed and granted a period of three months from and after the

this [Mathes, J.]

entry of ^ judgment ~~and decree herein~~ within which to satisfy and discharge the equitable lien herein and hereby allowed and granted to the petitioners, and any and all further proceedings by the petitioners for the enforcement of said lien be and the same are stayed for said period of three months from and after the entry of judgment and decree herein.

Sixth: The Court hereby retains jurisdiction over this action, and the parties thereto, and the subject matter thereof in order to act upon and determine the time when, and the manner in which, and the method, or methods whereby the payment of all or any part of the compensation and reimbursement for expenses hereby awarded to the petitioners shall be made or further secured, and in order to require and compel the satisfaction and discharge, or the enforcement of the equitable lien herein and hereby awarded to said petitioners; and if necessary, for the determination by the Court of the money value of the legal services rendered and performed by the petitioners for and on behalf of the plaintiff in this action, and for the appointment of a Receiver or Commissioner to effectuate the judgment and decree herein, in [50] accordance with the equitable jurisdiction, practice and procedure of this Court.

Seventh: That the parties to this proceeding pay their own costs, respectively, incurred therein.

Dated this 30 day of April, 1948.

WM. C. MATHES

Judge

Approved as to form as provided by local Rule 7: April 30th, 1948. Irl D. Brett, Special Assistant to the Attorney General.

Judgment entered May 3, 1948. Docketed May 3, 1948. CO Book 50, Page 491. Edmund L. Smith, Clerk, by Louis J. Somers, Deputy.

[Endorsed]: Filed May 3, 1948. Edmund L. Smith, Clerk. [51]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court, and to Messrs. John W. Preston, Oliver O. Clark, David D. Sallee, Attorneys at Law, 712 Rowan Building, 458 South Spring Street, Los Angeles 13, California:

Notice Is Hereby Given that Lee Arenas hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered herein on or about May 3rd, 1948, in favor of John W. Preston, Oliver O. Clark, and David D. Sallee, and from the whole thereof.

Dated this 2nd day of June, 1948.

JOHN J. TAHENY

625 Market Street

San Francisco 5, California

Attorney for Appellant Lee Arenas

[Endorsed]: Filed & mld. copy to John W. Preston, Jun. 2, 1948. Edmund L. Smith, Clerk. [52]

[Title of District Court and Cause]

ORDER FIXING TIME FOR FILING BOND ON APPEAL AND EXTENDING TIME FOR FILING RECORD ON APPEAL AND FOR DOCKETING APPEAL

Application having been made by Lee Arenas for an order fixing time for filing bond on appeal and extending time for filing record on appeal and for docketing appeal, and good cause appearing,

It Is Hereby Ordered that the time for filing the record on appeal with the United States Circuit Court of Appeals for the Ninth District, and for docketing the appeal with said court, be and the same is hereby extended to August 31st, 1948; and it is further ordered that Lee Arenas be and he is hereby allowed to file a bond on appeal in the sum of $250.00 at any time not less than five days before the filing of such record and the docketing of such appeal in said court.

Done in Open Court this 1st day of July, 1948.

WM. C. MATHES
Judge of the United States District Court

[Endorsed]: Filed Jul. 2, 1948. Edmund L. Smith, Clerk. [53]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America and Lee Arenas hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment made and entered herein on May 3, 1948, in C. O. Book 50 at page 488, in favor of John W. Preston, Oliver O. Clark and David D. Sallee, and from the whole thereof.

Dated: June 30, 1948.

JAMES M. CARTER
United States Attorney

IRL D. BRETT
Special Assistant to the Attorney General

By Irl D. Brett

Attorneys for Appellants, United States of America and Lee Arenas

[Endorsed]: Filed & mld. copy to John W. Preston, Jun. 30, 1948. Edmund L. Smith, Clerk. [54]

[Title of District Court and Cause]

STATEMENT OF POINTS ON APPEAL

The United States of America and Lee Arenas, Appellants in the above-entitled cause, submit the following statement of points which will be relied upon on appeal:

1. The Court erred in denying the Government's motion to dismiss the petition and order to show cause.

2. The Court erred in finding, concluding and adjudging that appellees were entitled to an equitable lien upon the restricted allotments involved and the income derived therefrom to secure the payment of attorneys' fees and moneys advanced as costs and expenses of suit, and in failing to find and conclude that it was without jurisdiction to impose such a lien. [55]

3. The Court erred in retaining jurisdiction in order to compel the satisfaction, discharge or enforcement of the equitable lien, and to appoint a receiver or commissioner to effectuate the judgment.

JAMES M. CARTER
United States Attorney
IRL D. BRETT
Special Assistant to the Attorney General
By Irl D. Brett
ROGER P. MARQUIS
JOHN C. HARRINGTON
Attorneys, Department of Justice, Washington, D. C.
Attorneys for Appellants, United States of America and Lee Arenas

Received copy of the within Statement of Points on Appeal this 10 day of September, 1948. John W. Preston, Oliver O. Clark, David D. Sallee, by John W. Preston, Jr.

[Endorsed]: Filed Sep. 10, 1948. Edmund L. Smith, Clerk. [56]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 59, inclusive, contain full, true and correct copies of Petition for Supplemental Decree for Attorneys' Fees and Expenses Advances, for Sale of Property and for Appointment of Receiver; Order to Show Cause; a Special Appearance of and Motion to Dismiss by The United States of America; Affidavit of Irl D. Brett; Appearance; Order Denying Dismissal; Answer to Petition and Order to Show Cause in re Supplemental Decree for Attorneys' Fees and Expenses Advanced, for Sale of Property, and for Appointment of Receiver; Minute Order Entered February 10, 1948; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal of Lee Arenas; Order Fixing Time for Filing Bond on Appeal and Extending Time for Filing Record on Appeal and for Docketing Appeal; Notice of Appeal of Lee Arenas and United States of America; Statement of Points on Appeal and Designation of Record on Appeal which, together with copy of reporter's transcript of proceedings on March 31, 1948, transmitted herewith, constitute the record on the appeals of Lee Arenas and United States of America to the Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 23 day of September, A. D. 1948.

(Seal) EDMUND L. SMITH
Clerk

By Theodore Hocke
Chief Deputy

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Wednesday, March 31, 1948

Appearances:

For Petitioners: John W. Preston, Esquire, Oliver O. Clark, Esquire, and David D. Sallee, Esquire, in Pro Per.

For Respondent Lee Arenas: John J. Taheny, Esquire.

For Respondents United States of America and Lee Arenas: Irl D. Brett, Esquire.

Los Angeles, California, Wednesday, March 31, 1948
2:00 P. M.

The Court: Gentlemen, your arguments have been most helpful to me, I did not think on Monday that by the time you were concluded I would feel clear enough on this matter to decide it, but I feel perfectly clear about it now and there is no occasion to write an opinion on it. If it goes to the upper courts they will take that privilege.

I am sure Mr. Brett agrees and would be the first to say that the Government of the United States can always afford to be fair with its citizens, and that includes attorneys as well as Indians and others. So anything I say which might imply criticism of any action or inaction on the part of the Secretary of the Interior—and I do not have any intention of saying anything at this time—but, if I do, it has no weight in this decision.

As I see the matter, in the first place, it calls for an interpretation of Section 345, Title 25 of the United States Code; and, as I read it in relation to this proceeding, by Section 345 the United States consents to the

jurisdiction of this court in equity in a proceeding such as this.

I appreciate that the sovereign cannot be sued without its consent and that consent should be strictly construed. But once given that consent is to be liberally construed to effectuate that purpose. The considerations governing such [2*] interpretation of sovereign consent are well discussed in the opinion of Mr. Justice Reed in the case of United States v. Shaw, 309 U. S. 495, particularly at pages 500-502, possibly et seq.

This being an equitable action, then, as I interpret it, and the Government having consented to the invocation of the equity jurisdiction of this court, I want to consider at the outset the scope of that jurisdiction.

Equity jurisdiction, as conferred by the Constitution on the Federal Courts, imposes the duty to adjudicate according to equitable rules and principles recognized by the Court of Chancery in England at the time our Constitution was formed. The Supreme Court discusses that in numerous cases. One of the recent cases is Atlas Insurance Co. vs. W. I. Southern, Inc., 306 U. S. 563, at 568.

No such broad jurisdiction is conferred on Federal Courts in actions at law. But here we are dealing, as I say, with a suit in equity and with a proceeding in that suit in the nature of a supplemental bill for the taxation of costs as between solicitor and client.

As I have said earlier in this proceeding, that power, time-honored and inherent power, of courts of equity or courts of chancery at the time of the adoption of our Constitution and prior to that, is discussed in the scholarly

*Page number appearing in original Reporter's Transcript.

opinion of Mr. Justice Frankfurter in Sprague vs. Ticonic Bank, 307 U. S., [3] particularly at pages 164 et seq.

Of course, this is not a Ticonic Bank case. This is a case involving what I would construe to be a fund (i. e. the land represented in the allotment) an interest in it. And Lee Arenas' interest is akin to the interest Barnett had in the fund in U. S. vs. Equitable Trust Co., 283 U. S. 378. In my view the same considerations that prompted the court there, as a court of equity, to assess fees as between solicitor and client, apply here.

The only distinction of any consequence between the problem at bar, as I see it, and the problem in the Equitable Trust Company case is the basis of the court's jurisdiction or power to bind the United States. In the Equitable Trust case, as has been argued, there was no statute under which the United States had consented to be sued in such an action as that action by Barnett, the Indian, through his next friend, against the Equitable Trust Company, and more particularly against the American Baptist Home Mission Society. The United States intervened, and consent there was, as Mr. Brett has pointed out, construed to arise, as it did, in such cases as The Siren, 7 Wall 152, and U. S. vs. The Thekla, 266 U. S. 328, and others which are cited in 283 U. S. at page 746. There are later cases to the same effect, that where the United States itself invokes the jurisdiction of the court, it to that extent consents in an equitable proceed- [4] ing that complete justice be done as is the custom. Of course equity, having taken jurisdiction for one purpose, will retain that jurisdiction to do complete justice between the parties.

So I find there is, for those reasons, jurisdiction under 25 U. S. C. Sec. 345 to bind not only Lee Arenas but the

United States, as a party to the main action in this proceeding, by whatever determination this court makes in the nature of an award between solicitor and client.

I mentioned the considerations prompting the award in the Equitable Trust Company case. They are also involved in U. S. vs. Anglin & Stevenson, et al., 145 Fed. (2d) 622, a Tenth Circuit case decided in 1944. So that brings us to the question of what costs and what fees should be assessed as between solicitor and client in this case.

Before I proceed, I want to say again that in determining this action under Section 345 of Title 25 to be an equitable proceeding, I am relying in part upon the decision by Mr. Justice Jackson in Arenas vs. United States, 322 U. S. 419, at page 430, and the cases cited there, that case I mentioned yesterday, I believe, namely, Hy-Yu-Tse-Mil-Kin vs. Smith, 194, U. S. 401; and U. S. vs. Payne, 264 U. S. 446, I believe there are other decisions where the point was not expressly raised, in which the very nature of the action and the relief granted demonstrated that the equitable powers [5] of the court were invoked in a proceeding under Section 345.

So now the question of what costs should be assessed. If there is a contract between the solicitor and the client that fixes an actual recovery or fixes the rate of recovery, of course, the court will take that contract as governing the maximum amount as long as the amount appears to be fair and equitable. If it were an inequitable contract, a court of equity would not consider itself bound to heed an arrangement, even between the parties, which is inequitable as to amount.

It seems to me that under Section 85 of Title 25 this contract of November 20, 1940, not having been made with

the consent of the United States, is void. I believe the Assistant Commissioner had the same idea in mind, although he does not say so, in the letter which was introduced in evidence here from the Assistant Commissioner to Mr. Sallee declining to take any action on the contract. As I see it, the contract clearly deals with, or, in the language of Section 85, Title 25, relates to tribal property in the hands of the United States, or did at the time it was made. However that may be, even were it not for that consideration, the 1940 contract was made subject to the express approval of the Commissioner of Indian Affairs and the Secretary of the Interior. In view of their refusal to have anything to do with it, it is very difficult to know how that contract could [6] ever have been enforced or ever have been carried out.

If it were not for the subsequent conduct of the parties, I would be prepared to say that the contract being made subject to that condition, and that condition never having come to pass, the contract never came into effect. But, as has been pointed out in argument by Mr. Brett, I believe, or Mr. Taheny, these conditions were for the benefit of the parties and the parties treated the contract as being in effect. The petitioners here allege it was in effect up to the time in 1945 when it was superseded, and the other party to the contract, Lee Arenas, contends it is still in effect. So the parties have obviously waived the performance of these conditions.

Even if that were not so, it would seem to me that Mr. Sallee, and Mr. Clark who was with him in all these matters, would be estopped now to assert that their services were worth more than the ten per cent or one-tenth specified in the contract. They placed that valuation upon their services at the time. And there is no showing here

that they, having obligated themselves to render those services (assuming the validity of the contract now), ever gave any consideration for a modification.

Without going into a discussion of those attorney fee cases in California, and getting to the point of whether or not the contract was superseded, I say it seems to me it was [7] void in the first instance under Section 85, but the result would be the same in this case, because I am not here to enforce the contract; I am here to take a measure and find an equitable compensation and an equitable taxation of fees between solicitor and client, and this contract is merely one bit of evidence to aid me in determining what is fair and equitable between the parties.

So I find that petitioners David D. Sallee and Oliver O. Clark are estopped to claim any greater fee than ten per cent of the value of the lands embraced in the allotment to Lee Arenas.

The Petitioner, John W. Preston, is not in that position. I feel that Mr. Brett made an accurate analysis of that situation. Petitioner Preston was in no way bound by the 1940 contract, assuming it was in force. If it was in force, then petitioners Clark and Sallee were obligated to perform the services without increased remuneration, and the attempt in the 1945 contract to increase that remuneration to them for the same services was ineffective.

Not so as to Petitioner Preston. His employment was on a quantum meruit basis and his services were rendered on a quantum meruit basis, and I find that he is entitled to 12½ per cent of the value of the lands involved in the allotment as reasonable compensation for his services, and to reimbursement to the extent of $258.67 by reason of out-of-pocket costs advanced on behalf of Lee Arenas in the performance of [8] his services.

Accordingly I declare a lien upon the allotment and upon all rights conferred by the allotment, and upon the entire interest of Lee Arenas and his heirs in the land embraced within the allotment in the hands of the United States, and upon the rents, issues, profits and income derived from all or any part of the lands embraced within the allotment, and the proceeds of any land embraced within the allotment in the hands of the United States and, as well, in the hands of Lee Arenas and his heirs, to the extent of an undivided one-tenth interest as to petitioners Oliver O. Clark and David D. Sallee jointly in their favor, and to the extent of an undivided one-eighth interest in favor of petitioner John W. Preston.

Mr. Brett: Would your Honor permit an interruption merely for correction?

The Court: Yes.

Mr. Brett: I think you have overlooked the costs, and I think that lien of Judge Preston's would run for his costs, one-eighth plus his costs, as stated.

The Court: Yes, Thank you. I mentioned that previously but I had omitted it in impressing the lien.

And a further lien in his favor to the extent of the personal advance of $258.67 by Petitioner Preston. At the time you interrupted I was thinking of the costs of this [9] proceeding.

I find it would be equitable to permit both parties to bear the cost of these proceedings.

The court hereby retains such jurisdiction as may be necessary to enable the court to act upon and determine the time when, and the manner in which, and the method whereby payment of all or any part of the compensation and reimbursement for expenses hereby awarded shall be made or further secured.

In that connection I hope it will not be necessary to go to that expense, but I will entertain an application for the appointment of a receiver.

Mr. Preston: I do not know as I understood your Honor fully as to the extent of the lien.

The Court: I have declared a lien upon the allotment, upon all rights conferred by the allotment, upon all the lands embraced within the allotment, upon the entire interest in the land in the hands of the United States, and upon all the rents, issues, profits, income and proceeds derived from the land in the hands of the United States.

In other words, it is my view that the court, having jurisdiction under 25 U. S. C. Sec. 345 to render the relief in the main action, has jurisdiction to affect that land, and that the United States has consented to the exercise of full equitable jurisdiction in this action. That is my view of it.

[Endorsed]: Filed Sep. 10, 1948. Edmund L. Smith, Clerk. [10]

[Endorsed]: No. 12046. United States Court of Appeals for the Ninth Circuit. Lee Arenas, Appellant, vs. John W. Preston, Oliver O. Clark and David D. Sallee, Appellees. United States of America and Lee Arenas, Appellants, vs. John W. Preston, Oliver O. Clark and David D. Sallee, Appellees. Transcript of Record. Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed September 24, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, February 10, 1948

Appearances:

For Petitioners in Pro Per: John W. Preston, Esquire; Oliver O. Clark, Esquire, and David D. Sallee, Esquire.

For Respondents: Jerry Giesler, Esquire; Meyer M. Willner, Esquire, and H. L. Thompson, Esquire.

(Substituted for Messrs. Giesler, Willner and Thompson): John H. Taheny, Esquire, and Horace A. Dibert, Esquire. Irl D. Brett, Esquire, Spec. Asst. to the Attorney General of the United States.

* * * * * * * * *

Mr. Brett: You mean the present value?

The Court: Yes. It would be very difficult to show me that it would be wise for me to attempt to make an award predicated upon the present value of this property. If an award is made, I would be inclined to make it on the basis of percentage, which would rise or fall with the valuation of the property.

Mr. Brett: That is true. But, of course, then as an incident would have to be what is the value that we have to get to. I mean that is the cornerstone of whatever we are taking a percentage of.

The Court: Yes; it is helpful to know whether we are dealing with a million dollars or a thousand dollars. That is very helpful in determining a percentage. [127]

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L. R. MARTINEAU, JR.,

called as a witness by petitioners, being first sworn, was examined and testified as follows:

* * * * * * * * *

Direct Examination

By Mr. Preston: [175]

* * * * * * * * *

Q. I see. Well, Mr. Martineau, taking into consideration the nature of the questions of law involved in this case, as disclosed by your examination of the record on file herein, and taking into consideration the work performed by petitioners, as disclosed by this examination, and assuming the statement of facts in Petitioners' Exhibit 4-A are true, and further assuming that the oral testimony presented in your hearing today is true, have you an opinion as to the reasonable value of the services performed herein collectively by the petitioners, John W. Preston, Oliver O. Clark, and David D. Sallee? Answer that yes or no. A. I have.

Q. Will you please give us the benefit of your opinion? [186] A. In my opinion—

Mr. Taheny: Your Honor, might I say just for the sake of the record that it is understood that an objection will run to this testimony on the ground that a quantum meruit has no relevancy to the proceeding. In other words, we are not assuming that the quantum meruit contract of February 1st, 1945 has any validity or any room in this case.

The Court: Your objection is that it is irrelevant and immaterial?

Mr. Taheny: It is on that ground, your Honor.

(Testimony of L. R. Martineau, Jr.)

The Court: The objection is overruled.

The Witness: May I have the last question read, please?

Mr. Brett: May I add to the objection that it is incompetent upon the ground that a contract, as made by an attorney, fixing a fixed fee, the quantum meruit then does not apply and the matter is incompetent.

The Court: As I understand, then, there is no objection to the qualifications of the witness, nor is there objection to the question propounded as such, that is, to the form of the question?

Mr. Taheny: That is correct.

Mr. Brett: I wanted to add, in addition to the materiality, incompetency because of the fact there is a fixed contract.

The Court: There is no objection on the ground the [187] question assumes facts not in evidence?

Mr. Taheny: What is that, your Honor?

The Court: There is no objection on the ground the question assumes facts not in evidence?

Mr. Taheny: No; there is not.

The Court: Merely the objection it is incompetent, irrelevant and immaterial upon the grounds you gentlemen have stated?

Mr. Taheny: That is right. That is right, your Honor.

The Court: The record will so show and the objection is overruled.

The Witness: If the court please, may I have the question read?

The Court: The question calls for an expression of your opinion.

(Testimony of L. R. Martineau, Jr.)

Mr. Preston: Yes. You answered the question "yes," and then my last question was: Give us the benefit of your opinion, if that is the question you are interested in.

A. If I assume the valuations which have appeared in evidence at this hearing—

The Court: You just state a figure, if you will, please, assuming the property is worth a million dollars or thereabouts.

A. Assuming the property to be worth a million dollars or from one million up to $1,047,000, as the two [188] witnesses have testified, and if I am now to state a figure in dollars, I believe that a fee of $275—

Mr. Preston: 275 what?

A. $275,000 as an award to the petitioners in this matter now on hearing would be a reasonable and a moderately reasonable fee.

And if, on the contrary, I assume from the discussions which I have heard and the remarks of your Honor, that there is a question yet to be determined, not before me, of valuation, and a substantially lower valuation might be determined by the court and therefore a percentage basis should be used as a means by which the court might determine a reasonable compensation, then in my judgment that percentage should approximate twenty-seven and one-half per cent, and in no event should be lower than 25 per cent, might be as high as thirty-three and one-third per cent, and would not be unreasonable if it were 50 per cent.

I put the question, if I may explain, in the alternative in the light of the studies which I have made of this case and this record, and in the light of the testimony

(Testimony of L. R. Martineau, Jr.)

which has been given here, in order to facilitate your Honor in a determination which I know from experience in any case of this sort is difficult.

The Court: Have you assumed that the compensation of the attorneys, the petitioners here, is entirely dependent [189] upon the outcome of this case?

The Witness: I have. But I should like to add to that answer, if the court please, that I, in this matter, as usual, referred to Canon No. 12, I believe it is, of the Code of Ethics of the American Bar Association, which, as I recall it, specifies six factors which normally should be considered by counsel in attempting to arrive at a reasonable fee and, to supplement that, refreshment of my memory by looking over certain notes and memoranda I had respecting fees which involved, in all probability, 10 or a dozen other factors.

Limiting my answer for the moment to matters mentioned in the Canon of the American Bar Association, the fact that compensation is taken on a contingency is one of the important factors to be considered. But I should add here that all factors under the holdings of the courts need not be given by a witness as having equal weight under the circumstances in any particular case.

The Court: I take it you have taken into consideration the nature of the matter, the amount involved, the complexity of the problem?

The Witness: I have.

The Court: The responsibility imposed, the time spent, and the results achieved?

The Witness: I have taken all of those factors into [190] consideration.

(Testimony of L. R. Martineau, Jr.)

The Court: As well as the fact that all compensation —you have assumed all compensation to be contingent?

The Witness: I have.

The Court: Now, if you assume that compensation is not contingent what would be your opinion, both in dollars and in percentage?

The Witness: If I assumed that the compensation were not contingent and that the clients were financially able to pay what members of the profession would call a reasonable fee, I would not make a reasonable fee at the conclusion of the litigation and efforts made by counsel in this case on the 27th of last August at very much less than $250,000, if the court please, even if there were a fixed ability to pay.

The Court: That is, considering all the factors you have mentioned, except—

The Witness: The contingency.

The Court: —except the contingency. What would you say would be a reasonable percentage of the recovery, assuming that the fee was not contingent?

The Witness: As I stated a moment ago, I think that the recovery might well have been one-third to a half. But I might explain that answer, if your Honor desires, by saying that from my study of the records in this case I [191] would assume that Lee Arenas was, to use Judge Preston's phrase, put upon the country; that he would not have any greater or lesser rights than any other fully qualified citizen of the United States or than I myself might have if I had to go to the Bar with a problem such as his, making no distinction either in his favor or against him because of his being a member of the Mission Band of Indians, in which event I would

(Testimony of L. R. Martineau, Jr.)

have found that my fellow members of the Bar would have said to me: That you may expect this case, taken on a contingency, to be 25, 33-1/3, or 50 per cent, depending upon the stage at which it may be concluded, which is well familiar to all of us.

The Court: If not taken upon the contingency, what percentage do you think the petitioners should be entitled to as reasonable fees for their services?

The Witness: I would think that if the case were not taken on a contingency, that a reasonable fee ought to provide for a base fee. By that I mean a fee not less than a certain sum plus the reasonable value of services.

If I did not answer your question, your Honor, I perhaps did not understand it.

The Court: Suppose they were not contingent, but upon the completion of the litigation, why, the client said: "Well, gentlemen, you have recovered this property for me. That is all I have. I am willing to give you a share of [192] what you have recovered"?

The Witness: Well, if that were true, then, your Honor—

The Court: What would be that percentage, then?

The Witness: I would not base the fee upon a percentage. I would have to take into consideration the other five factors of the American Bar Association over and above the contingency, and I might want to take into consideration some of the other factors established by the court.

The Court: Perhaps you did not understand my question. I am assuming that you are taking into consideration all other factors which you have mentioned.

(Testimony of L. R. Martineau, Jr.)

The Witness: Then I would answer you—

The Court: But we will assume that the compensation is not contingent upon recovery.

The Witness: All right. If I now understand your statement correctly, I would say that it would be upon a percentage plus some other figure. I tried to answer that by saying it would be plus some basic compensation, with a percentage of the recovery of property or a percentage based upon the amount and success of the litigation, depending upon the success of the litigation, and that percentage, I think, would have to be analyzed in the particular case.

Now, in this particular case, if the court please, I have not made any such computation. [193]

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T. B. COSGROVE,

called as a witness by petitioners, being first sworn, was examined and testified as follows:

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Direct Examination

By Mr. Preston: [234]

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Q. That is the case. Well, Mr. Cosgrove, if you were to assume the facts set forth in the Petitioners' Exhibit 4-A to be true and correct, and add to that your

(Testimony of T. B. Cosgrove)

research of the exhibits mentioned here in 10, 10-A and -B, 11-A, 11-B, 12-A, -B, -C, 13-A, -B, -C, and -D, and you applied to them the rules of law that are set forth in the authority that you refer to to the facts as detailed by these documents that you have examined, and couple that with your own experience and judgment as a trial lawyer in this State, have you an opinion as to what would be or should be the reasonable value of the services performed by petitioners in this case known in the record as Arenas vs. The United States of America?

A. Yes; I do.

Q. Have you any particular form in which you prefer to express your opinion, that is to say, in dollar value or in percentage of property recovered? [246]

A. I cannot express it in dollar value. I can express it only in percentage.

Q. Will you please give us the benefit of your opinion? A. 27½ per cent.

Q. 27½ per cent. You have given that idea much thought, have you not, Mr. Cosgrove?

A. I have worked on it, I would say, several days.

Q. Several days. And that is the conclusion you reach. You said you could not put a dollar value on it. Why is that true?

A. Because the value, as I understand it, is entirely uncertain, and in this statement which I have here it says the value of the lands recovered is considerably in excess of $1,000,000. That might mean 10,000,000.

(Testimony of T. B. Cosgrove)

Q. I see. If it was in excess of a million you would make it 27½ per cent?

A. Well, I thought the value was a decidedly uncertain factor and I would not want to undertake any statement about what the value of the services were, expressed in dollars and cents.

Q. Then, if this court finds that value of the property to be much or little, your percentage would stand as a single item or a calculation, would it?

A. That is correct. The figure I arrived at is not contingent upon whether it is worth more than a million or [247] less than a million. [248]

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Cross-Examination

By Mr. Taheny: [274]

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Q. I say, you have read and familiarized yourself in a general way with the contents of the briefs which were filed in the Circuit Court of Appeals in connection with the appeal of Lee Arenas from the summary dismissal?

A. Well, I will say yes, but permit me to say that when I examined the briefs I did not examine the briefs like a judge of the Circuit Court of Appeals would who would be called upon to write an opinion, because I knew the opinions had already been written and the case had been decided. I examined the briefs only for the purpose

(Testimony of T. B. Cosgrove)

of determining what the point was that was presented; and then I examined the decisions of the court very carefully to see how the court had decided these issues of law and fact for the purpose of determining, not how the case should be decided, but the extent and the character of skill required to present the matter anew to the Circuit Court of Appeals and to the Supreme Court. So if you have in mind the purpose for which I examined the briefs, the answer would be yes. [279]

Q. Well, did you notice any difference, any essential difference, in the points presented in the appeal brief in the Circuit Court of Appeals and the points presented in the petition for certiorari filed in the Supreme Court of the United States, the petition that was filed about October 29, 1943, that is the first petition for certiorari in the Arenas case?

A. I noticed—I am not certain about dates; I do not carry dates in mind—but I think that there isn't any fundamental or clearly ascertainable distinction in the points that were presented originally to the Circuit Court of Appeals and to the Supreme Court of the United States in the first appeal in the Arenas case. The difference is in the manner in which they were presented and the success that accompanied the presentation of them. [280]

* * * * * * * * *

The Court: Let us assume the value of the land is $100,000.

The Witness: It would still be 27½ per cent.

(Testimony of T. B. Cosgrove)

The Court: If it was $50,000 would it still be the same?

The Witness: Still be the same; yes.

The Court: And if it were a million dollars?

The Witness: It would still be the same.

The Court: If Mr. Sallee or Mr. Clark or Judge Preston, alone, had done this work and accomplished these results instead of three of them doing it together, would your opinion be the same?

The Witness: I don't know. I did not consider if one had done it alone. I considered the object of the proceeding; I considered the difficulties that they were faced with; that they encountered these preceding decisions; I considered the work that they did; I considered the result they obtained; and I considered it as a community venture.

The Court: Let us assume that this same work was done by some attorney, take any name you please, just a name, and these same results accomplished, would your opinion still be the same?

The Witness: It is my experience, Judge, that where two and three men work on a case, and particularly where their effort is accompanied with success, conspicuous [289] success, that they are entitled to more than if there had been only one. [290]

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RESPONDENTS' CASE IN CHIEF.

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LEE ARENAS,

the plaintiff and a respondent herein, called as a witness by respondents, being first sworn, was examined and testified as follows:

* * * * * * * * *

Direct Examination

By Mr. Taheny:

Q. Your name is Lee Arenas? A. Yes, sir.

Q. And you are a party to this proceeding?

A. What?

Q. You are a party to this proceeding?

A. Oh, yes, yes.

Q. How old are you, Mr. Arenas?

A. Oh, about 71, 72.

Q. I am handing you a contract which is in evidence [291] as Petitioners' Exhibit 7. It purports to bear your signature. I will ask you whether it does have your signature? A. I don't know a thing about it.

Mr. Preston: What is his answer?

(Answer read by the reporter.)

Q. By Mr. Taheny: I am also showing you another contract, which is marked Petitioners' Exhibit 8 for identification, which appears to be identical except for the fact that it names your wife as a party, instead of yourself, and it purports to be signed by Marian Therese Arenas, your wife. I will ask you whether you ever saw that contract before? A. What is that? What does it say?

(Testimony of Lee Arenas)

Q. It is a contract, power of attorney, by Marian Therese Arenas to David D. Sallee, John W. Preston, and Oliver O. Clark, bearing date of February 1, 1945. Did you ever see that paper? A. No.

Mr. Taheny: Will it be all right if I stand close to the witness, your Honor? He has difficulty understanding me, he tells me.

The Court: Yes.

Q. By Mr. Taheny: Mr. Arenas, I now show you a document purporting to be a document or agreement signed [292] on November 20, 1940, between you and David D. Sallee. A. Yes; I did.

Q. Do you recall signing that contract I am showing you? What purports to be your signature, is that your signature? A. Yes.

Q. This last contract, which is marked Petitioners' Exhibit No. 6, provides for a fee of 10 per cent.

A. Yes, sir.

Q. 10 per cent. A. 10 per cent.

Q. Did you understand at the time you signed that that it was to be for 10 per cent? A. Yes, sir.

Q. Now, at any time thereafter did Mr. Sallee or Mr. Clark or Mr. Preston or anybody else inform you that there was to be a different fee or a higher fee for the work done in this case in your behalf?

A. They never say nothing about me—about it to me.

Q. Did Mr. Sallee at any time act as your attorney in another case that was filed against you by the Government after the present suit was filed?

A. Well, I am always depending on him, Mr. Sallee.

Mr. Preston: What is the answer, Mr. Reporter?

(Answer read by the reporter.) [293]

(Testimony of Lee Arenas)

Q. By Mr. Taheny: Mr. Arenas, do you remember being served with some suit papers in a suit brought against you and a number of other Indians?

A. Yes.

Q. 10 or 15 Indians? A. Yes.

Q. A suit in ejectment?

A. In ejectment, I think.

Q. That was a suit filed about 1943?

A. Something like that; yes.

Q. And at that time did Mr. Sallee agree to represent you in connection with that particular suit?

A. He took that paper and he was going to defend me, on me, for me.

Q. And did you pay him any money for his agreement to defend you in that particular suit?

A. I don't remember. I had been giving him money for something else.

Q. Was your wife Marian Therese Arenas also named as a defendant in that particular suit by the Government?

A. Maybe she knows about it. I don't know anything about it.

Q. No. I say, was she also served with suit papers in that particular case?

A. I think she told me; yes. [294]

Mr. Taheny: Your Honor, I borrowed this letter from Mr. Brett. He said that he has not shown it to opposing counsel. I am asking permission to do so now.

Q. Mr. Arenas, I now show you a letter on the letterhead of "David D. Sallee," dated November 7, 1944, and signed by him or purporting to be signed by him, and addressed to "Mr. and Mrs. Lee Arenas, Palm Springs, California." I will ask you if you remember receiving that

(Testimony of Lee Arenas)

letter from Mr. Sallee on or about that date? What is your answer?

A. I know his name, but I think my wife knows all about the letter.

Q. Do you recognize the letter yourself?

A. Yes.

Mr. Taheny: We would like to offer this into evidence, your Honor.

Mr. Preston: I have no objection, except that it is immaterial. It relates to expenses.

Mr. Taheny: And also, I will ask counsel for—I will first make this offer. I have offered it in evidence, your Honor.

The Court: Objection is overruled. The document is received as Respondents'—

The Clerk: D, your Honor.

Mr. Taheny: I would also like to ask counsel if they will stipulate that this ejectment suit to which I referred [295] in my question was filed October 4, 1943, in this court, and the number of it is 3184-O'C?

Mr. Preston: I will so stipulate. I have some knowledge of it.

Mr. Taheny: And may the record in that proceeding be deemed incorporated herein by reference?

Mr. Preston: Well, I have objection to it. I do not know why it should be admitted, but if the court wants to hear it, it is all right with me.

The Court: How would it be material?

Mr. Taheny: We propose to show by other testimony which will tie up with Mr. Arenas' testimony that these papers that were signed in 1945 were signed by Mr. Arenas and Mrs. Arenas, as well as by other Indians, in

(Testimony of Lee Arenas)

contemplation of defense to this action, and with no contemplation then that they refer to the present proceeding of Arenas versus the United States.

The Court: If you have the action identified is it necessary, for your purposes, to have the record of the action here?

Mr. Taheny: Well, perhaps not, if we will do this, your Honor: I would like to say that the answer was not filed for a considerable period of time, not until December 12, 1944. The action was filed in 1943.

The Court: I will overrule the objection and receive [296] the file. What was that case number?

Mr. Taheny: It is No. 3184-O'C.

The Court: 3184-O'C is received into evidence by reference as Respondents' Exhibit—

The Clerk: E, your Honor.

The Court: E.

Q. By Mr. Taheny: Mr. Arenas, at any time at all were you informed that it will be necessary to associate Judge Preston in this case? A. No; I never know.

Q. Were you at any time informed that it will be necessary for you to pay a higher fee in order that Mr. Clark and Mr. Sallee will get another attorney to work with them on the case?

A. Never knew anything about it.

Mr. Taheny: That is all, your Honor.

Mr. Preston: Is that all?

Mr. Taheny: Yes, sir.

(Testimony of Lee Arenas)

Cross-Examination

By Mr. Preston:

Q. Mr. Arenas, you knew that I tried your case for you, did you not?

A. I don't know nothing about it but Therese knows about it.

Q. You testified as a witness on the trial of your [297] case, didn't you? A. Before Sallee, yes.

Q. Before Judge O'Connor. Do you remember being on the witness stand in Judge O'Connor's court?

A. Judge O'Connor's court, with Sallee. I have Sallee right there with me.

Q. I am asking you if you were in the court room and testified as a witness when Judge O'Connor tried your case? A. Yes.

Q. Didn't I examine the witnesses?

A. I don't remember.

Q. Didn't I examine you?

A. I don't remember.

Q. You don't remember? A. No.

Q. Didn't I put you on the stand as a witness and ask you some questions in front of Judge O'Connor?

A. How long ago is that?

Q. Well, 1945, along about the last day of January.

Mr. Taheny: January 30, 1945.

Mr. Preston: January 30, 1945.

A. Well, in that case, you know, Sallee ought to know all about it. I don't know nothing.

Q. I am not asking you about Sallee at all. I am asking you if I did not call you to the witness stand and [298] ask you questions and you gave your answers on your case? A. Yes.

(Testimony of Lee Arenas)

Q. What? A. I say, "yes."

Q. You said, "yes." Well, didn't I examine all witnesses that took the stand in that case?

A. I don't know nothing about it.

Q. Oh, yes. There is no laughing about it, Lee. You remember Mr. Wadsworth taking the witness stand?

A. Mr. Wadsworth, yes.

Q. Didn't I ask him the questions? A. Yes.

Q. I did. And you knew I was helping you, didn't you? A. I know you was in there; yes.

Q. Didn't you know that before the day you came up here to try the case? A. Who is that?

Q. Didn't you know that then? Didn't you know that I helped you in the Supreme Court of the United States?

A. Yes; before the Judge. Yes.

Q. You knew that I went to Washington?

A. That is what you said; yes.

Q. What? A. That is what you said.

Q. What I said? [299] A. Yes.

Q. And you knew you won the case at Washington, didn't you? A. That is what you said.

Q. You knew I was helping, didn't you?

A. Yes.

Q. Did you ever tell me to get out of the case, that you didn't want me? A. I never did. I never did.

Q. You never did. You liked what I was doing, didn't you? A. Oh, yes. Why not?

Q. Why not? That is what I say. Then after I tried the case for you here and you were on the witness stand in Judge O'Connor's court, you went down and signed this paper, didn't you? A. I don't remember.

(Testimony of Lee Arenas)

Q. Can you sign your name? Can you write your name? A. Oh, I can do—

Q. Let's see that paper. Have you got it here? I show you this Petitioners' Exhibit No. 7 and call your attention to the word "Lee" and to the word "Arenas." Didn't you make that mark on there?

A. I don't know. Maybe I did.

Q. What? [300] A. Maybe I did.

Q. Maybe you did. Well, don't you know whether you did or not? A. I don't know.

Q. You don't know. Don't that look like your handwriting? A. I guess.

Q. How long would it take you to sign your name now?

A. About—it would take quite a while.

Q. What would we have to do to get you ready to sign it? Would you have to have a chair and a table?

A. Oh, right here I can sign it; yes.

Q. Right here you can sign it. Well, give us a piece of paper, Mr. Clerk. Do you want a pen?

A. Oh, anything will be all right.

Q. Well, I guess this was written in pen. How would you like to write it with Preston's pen? It won't cost you a cent. A. All right.

Q. Now, write "Lee Arenas."

A. Right here, huh?

Q. Right anywhere. Do you write with your left hand? A. I have to because this hand is no good.

Q. This hand is no good? A. No. [301]

Q. Ordinarily you write with your other one, do you?

A. Oh, when it is good; yes.

(Testimony of Lee Arenas)

(Witness marking on paper.)

Mr. Preston: All right. We submit that and offer that in evidence as part of the cross-examination of this witness.

The Court: The exemplar is received into evidence as Petitioners' Exhibit.

The Clerk: 18, your Honor.

Mr. Preston: And the Government was trying to put you off of your lands, were they not? The Government brought a suit. Do you remember that suit?

A. I don't remember.

Q. You don't even remember the suit. You were shown a paper here a while ago. You remembered it then, didn't you? You were shown a file of papers here a while ago about a suit to put you off your lands and all the other Indians down in Palm Springs.

A. Oh, in that case?

Q. Yes.

A. Yes; but it never come up to court, did it?

Q. No. Who got it dismissed for you, do you know?

A. I don't know.

Q. You don't know whether Preston did that or not, do you? [302] A. I gave the paper to Sallee.

Q. You gave the paper to Sallee. You don't know whether Preston did or did not get that dismissed for you, do you? A. I don't know.

Q. You don't know a thing about it?

A. I don't know a thing about it.

Mr. Preston: Mr. Clark would like to ask a couple of questions. May we have the unusual dispensation again?

The Court: You may.

(Testimony of Lee Arenas)

Further Cross-Examination

By Mr. Clark:

Q. Mr. Arenas, do you remember after Judge Preston and I had been back to the Supreme Court in Washington that I came out to Palm Springs and talked one evening to you Indians there by the Springs about Washington?

A. Yes; I remember that.

Q. And do you remember I told you that we were very happy with the reception we had received at Washington, as to what the judges had commented from the bench, and we felt very hopeful that you would win that case? You remember that? A. Yes.

Q. Then do you remember afterwards, when the Supreme Court decided in your favor, I came to Palm Springs, had [303] a meeting of the Indians, and I told you about the decision of the Supreme Court?

A. Yes.

Q. And do you remember that you asked me to come, because you said the Indian Agent said we didn't win anything, the Supreme Court decision didn't mean anything? Do you remember that? And so I said I would come out and meet with the Indians and tell them about the decision; do you remember that? A. I remember that.

Q. And do you remember that on both of those evenings I told you about the splendid work that Judge Preston had done for the Indians in working with us in the Supreme Court?

A. Right in office you told me that.

Q. And out in Palm Springs on these evenings there by the springs, that I came out and talked to many of the Indians together, don't you remember I told you about that?

(Testimony of Lee Arenas)

A. Maybe I heard you talk. I seen you there, but I don't understand the meaning what you were saying there.

Q. You did not understand what I was saying?

A. No.

Q. And do you remember, Mr. Arenas, that on a number of times, both in my office and at Palm Springs, you told me you were very grateful for Judge Preston being in the case?

A. Well, it is all right; yes. [304]

Q. And you were grateful, were you not?

A. I was.

Q. You thought I did a good thing for the Indians and for you when I brought Judge Preston into it, didn't you?

A. That is what you said, yes; because you know better.

Q. You believed it, didn't you?

A. I believed it. You know better.

Q. How long have you been writing with your left hand?

A. It been about three years, something like that.

Q. About three years? A. Yes.

Mr. Clark: That is all.

Mr. Taheny: That is all.

Mr. Brett: That is all with Mr. Arenas.

The Court: You may step down.

Mr. Taheny: Your Honor, we will call Mrs. Arenas at this time. It will be somewhat along the same line as Mr. Arenas, and it would be the logical time to put her on.

The Court: Yes; you may.

Mr. Taheny: Mrs. Arenas, will you take the stand, please?

MARIAN THERESE ARENAS,

called as a witness by respondents, being first sworn, was examined and testified as follows: [305]

The Clerk: Please state your name.

The Witness: Marian Arenas.

The Clerk: Marian Arenas.

Direct Examination

By Mr. Taheny:

Q. Mrs. Arenas, will you speak up so everybody can hear you. What is your name?

A. Marian Therese Arenas.

Q. And you are the wife of Lee Arenas?

A. Yes, sir.

Q. When were you married to him?

A. September the 17th, 1941.

Q. I show you a document which has been introduced in evidence—I mean which has been marked for identification as Petitioners' Exhibit No. 8, purports to be signed by you. It bears date of February 1st, 1945. I will ask you if that is your signature on that document?

A. Yes; it is.

Q. Now, below your signature there is a certificate of Benton Beckley, a notary public, certifying that you appeared before him on February 1st, 1945 and acknowledged the execution of that document. Do you remember whether or not you did go before Mr. Beckley?

Mr. Preston: To which we object upon the ground it is immaterial, it being admitted she signed the document. What difference does it make whether it is notarized or not? [306]

The Court: Overruled.

(Testimony of Marian Therese Arenas)

Q. By Mr. Taheny: Did you appear before Mr. Beckley at that time? A. No; I didn't.

Q. You did not? A. No.

Q. Now, I will show you a document which is in the same form, apparently a mimeographed copy of the previous one, except that it has the name of "Lee Arenas" filled in and purports to be signed by him on the same date. This one is referred to as Petitioners' Exhibit No. 7. I will ask you whether you remember or whether you were present at the time that document was signed?

A. Yes; I was.

Mr. Preston: What is the answer?

Mr. Taheny: She says I was, yes.

Q. Do you recognize that as the signature of Lee Arenas? A. With his right hand; yes.

Q. With his right hand? A. Yes.

Q. At the time these documents were signed had you been served with suit papers in the case of United States versus Lee Arenas, Marian Scott Arenas, and many other Indians? [307] A. Yes.

Q. At that time? A. Yes, sir.

The Court: You are referring now to?

Mr. Taheny: Referring to action 3184-O'C.

Q. At the time that you signed this document which is marked Exhibit 8 for identification were you a party to any other litigation? A. No, sir.

Q. Did you talk to any attorney before you signed this document? A. You mean on the ejection suit?

Q. Yes. A. Mr. Sallee.

(Testimony of Marian Therese Arenas)

Q. Can you state what was the conversation between yourself and Mr. Sallee at the time you signed this or in reference to the signing of this document which is marked Exhibit 8 for identification.

Mr. Preston: To which we object on the ground it does not appear to have any material connection with this case, if your Honor please. What happened between her and Mr. Sallee about defending the other case would not be important here.

The Court: Overruled.

Mr. Taheny: If the court please— [308]

The Court: Overruled.

Mr. Taheny: Pardon me.

The Court: You may answer.

The Witness: What was that question, now?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. Well, the Government served us with those ejectment suits and Mr. Sallee told me, himself, that I had to have somebody to defend me on that; and I told him that I didn't belong to the Tribe of the Palm Springs and they couldn't sue me because I didn't have anything. So I hired him at the time to defend me on that ejection suit.

Q. By Mr. Taheny: Well, as regards the signing of this document was there any discussion of the signing of this document at the time you had this discussion with Mr. Sallee relative to his defending you in the ejectment suit?

Mr. Preston: That is what she has just testified to.

Q. By Mr. Taheny: You just told us that he told you that you had to have an attorney. What I want to find out is: Was there any discussion between you and

(Testimony of Marian Therese Arenas)

him of this particular contract marked Exhibit 8 for identification?

A. No. He was only to defend me in the ejection suit, not on Lee's case.

Q. As regards the signing of this document, was this signed in reference to any particular suit?

A. No. [309]

Mr. Preston: I don't want to object all the time, if your Honor please, but I seem to have a different view. We do not claim anything under this contract against Lee Arenas. I put it in evidence only for the purpose of showing that he had an opportunity to have independent advice. I am not claiming anything or we are not claiming anything by virtue of this contract at all.

The Court: By "this contract" are you referring to—

Mr. Preston: The one signed by this witness.

The Court: —Exhibit 8 for identification?

Mr. Preston: Yes. That is the only thing we had it put in evidence for.

Mr. Taheny: I would like to ask counsel if his statement also applies to Exhibit No. 7, or is he relying on Exhibit 7 in this action?

Mr. Preston: We certainly will rely on Exhibit No. 7, but we are not relying on Exhibit No. 8 at all, except to show that they had the chance for independent advice.

The Court: Exhibit 8 is only for identification at this time?

Mr. Taheny: That is right.

The Court: Do the petitioners offer it into evidence?

Mr. Preston: I am not offering it now that I know of. At least I would take that question under advisement, your Honor, at this date. We only offered it for the pur-

(Testimony of Marian Therese Arenas)

pose of showing the party had a chance to have independent advice. [310]

The Court: That is Lee Arenas had?

Mr. Preston: Lee Arenas had independent advice. For that purpose I am willing to offer it again.

The Court: Is there objection to the offer of Exhibit 8 for identification? It is now received into evidence. I understand there was no objection.

Mr. Taheny: No objection.

Q. Were these documents which are now in evidence as Exhibits 7 and 8 signed at the same time?

A. Yes, sir.

Mr. Preston: What was the answer?

(Answer read by the reporter.)

The Witness: Yes.

Q. By Mr. Taheny: And at the time these documents were signed was anything said to you or to Mr. Arenas in your presence to the effect that either of these documents was to apply to the suit that is now involved in this case, that is, the suit of Arenas versus the United States? A. No, sir.

Q. At the time that Mr. Sallee told you that you needed an attorney was there anything said at that time about the necessity of you signing a contract?

A. He said I had to have a power of attorney so he could defend me in that suit.

Q. Are you speaking now of the ejectment suit? [311]

A. Yes, sir.

Q. And at all times thereafter it was your understanding that these two documents, Exhibits 7 and 8, applied only to the ejectment suit? A. That is right.

(Testimony of Marian Therese Arenas)

Mr. Preston: To which we object upon the ground that her understanding of Lee Arenas' document has nothing to do with it.

The Court: Overruled. The answer may stand.

Q. By Mr. Taheny: Now, do you know whether or not the other Indians involved in that suit, with the ejectment suit, also signed similar powers of attorney on the same mimeographed form?

A. There are some that did; yes, sir.

Q. And these other Indians had no connection whatever with the suit of Arenas versus the United States which is now pending here? A. No.

The Court: Your answer was "no"?

The Witness: Yes, sir.

The Court: You are not a member of the Tribe?

The Witness: No, your Honor.

Mr. Taheny: She is a Mission Indian, your Honor, but not a member of the Palm Springs band.

The Court: Is that correct? [312]

The Witness: That is right.

Mr. Preston: Is that all?

Mr. Taheny: That is all.

Cross-Examination

By Mr. Preston:

Q. Why, Mrs. Arenas, don't you recall that all the Indians in Palm Springs, practically, started new suits about their allotments; that I, as one of their attorneys, filed suits in this court for allotments for all of them? Don't you remember that? A. No; I don't.

(Testimony of Marian Therese Arenas)

Q. What?

A. No; I don't. Do you mean on the ejection suits or the allotment?

Q. No, no; we are not talking about the injunction or the ejectment suit at all now. I am talking about suits to get their allotments. Didn't I, as one of the attorneys in the case, file suits here in this court, some eight or ten or a dozen or more of them, for the purpose of having allotments, new allotments, made for these Indians or the old ones sustained? A. I don't know about that.

Q. You remember the Hatchitt case, don't you, that I carried to the Circuit Court of Appeals?

A. Yes, Mrs. Hatchitt and her daughter. Those are [313] the only two that I know of.

Q. Yes. But suits were begun for every one of the rest of them, and what these Indians signed was a power of attorney, an authority, just as in this suit here, Exhibits 7 and 8 here, was it not? You know that all the Indians signed statements similar to that, and that I began these suits, didn't I?

A. I know they signed up for the ejectment suit, but for the allotment suit I couldn't say.

Q. There is nothing said in there about ejectment suit, is there?

Mr. Taheny: If the court please, I do not want to interrupt Judge Preston but—

The Court: Make your objection.

Mr. Taheny: —it seems to me we should have some identification of these suits, because the only suits I know of are in the 4402 class, and we might like to refer to them. I would like to have Judge Preston identify them.

(Testimony of Marian Therese Arenas)

Mr. Preston: We will bring all these suits in as part of our case, and bring in a dozen of them.

Mr. Taheny: There were cases 4401-5, inclusive, filed later than the ejectment suit. You can tell them by the numbers, and I would like to at least have the question explicit enough to know whether Judge Preston is referring to those or to some other cases. [314]

The Court: The witness has stated that she knew about the Hatchitt cases and that is the extent of her knowledge about it.

Mr. Preston: That is the one we took up, and the rest of them we have nothing on because we dismissed, your Honor.

Q. The document signed here, Petitioners' Exhibit 8 in this case, did you read it? A. Sure, I did.

Q. You can read and write and talk English very well, indeed, can you not? A. To a certain extent.

Q. Were you educated? A. Yes.

The Court: What place? Where did you go to school?

The Witness: I went to Fallbrook High School.

Q. By Mr. Preston: You went to what high school?

A. Fallbrook.

Mr. Preston: Fallbrook High School. Did you go to the Sherman school out at Riverside?

A. No.

Q. How far did you go through school, what grade?

A. Oh, I went up to Haskell Institute and took a commercial course.

Q. Took a commercial course. Well, you read this document, you say, Exhibit 8? [315] A. Yes.

(Testimony of Marian Therese Arenas)

Q. You know it did not say anything about the ejectment suit, don't you?

A. Well, I was all upset because that is the first time they had ever served papers on me like that.

Q. You knew it did not say a word about the ejectment suit, didn't you?

A. I don't know. They asked me to sign that at the time, because I had no right to sign for Lee's allotment.

Q. Was Beckley there that day?

A. I have never been in Beckley's home.

Q. Was Benton in town that day when you signed that?

A. To tell you the very honest truth, I don't think I was in Los Angeles on the 1st of February.

Q. You were here to the trial of the case, weren't you? A. On the 1st of February?

Q. You and I were the very best of friends out here in the hall?

A. And we did sign these, Mr. Preston. I signed this at the house.

Q. You said it was your signature?

A. Why, sure.

Q. Was Mr. Beckley there when you signed it?

A. At my place?

Q. Yes, or wherever you signed it? [316]

A. I don't think so.

(Testimony of Marian Therese Arenas)

Q. You do not know for sure?

A. I don't ever remember of going before Mr. Beckley and signing it.

Mr. Taheny: He is not a notary in this county, is he, counsel?

Mr. Preston: What?

Mr. Taheny: He is not a notary in Los Angeles County, is he? He is a notary in Riverside County.

Mr. Preston: I don't know whether he was or was not.

Q. Did you go to school in Kansas, also?

A. Well, I said, "Haskell."

Q. What is that school?

A. It is an Indian school.

Q. An Indian school at what place?

A. Lawrence, Kansas.

Q. Where? A. Lawrence, Kansas.

Q. Lawrence, Kansas. How long were you there?

A. Not very long.

Q. Did you take a commercial course, did you say, there? A. Yes, but I didn't get through.

Q. You did not get through?

A. No. I just got started. [317]

Q. Did you get married, something like that?

Mr. Taheny: Just a moment. I make an objection here to that kind of cross-examination.

Mr. Preston: That is all.

The Court: Any further questions of Mrs. Arenas? You may step down. [318]

* * * * * * * *

DAVID D. SALLEE,

one of the respondents herein, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brett:

Q. Mr. Sallee, I will show you a letter addressed by you to James A. Murray, Special Assistant to the Attorney General, at Los Angeles, dated December 4, 1944. Does that letter not bear your signature?

A. It does.

Mr. Brett: Will you mark this for identification as our next exhibit, Mr. Clerk?

The Court: Is there any objection?

Mr. Preston: No objection.

The Court: Do you intend to offer it?

Mr. Brett: Then I will offer it into evidence.

The Clerk: Exhibit K.

The Court: Received into evidence.

Q. By Mr. Brett: Now, Mr. Sallee, is it not a fact that following the dispatch of the letter which has just been marked as Respondents' Exhibit K, that you and Mr. Oliver O. Clark and Judge Preston, as associates, filed an answer in the ejectment action in Case No. 3184-O'C, which was against Lee Arenas and his wife; and, at the same time, also filed identical answers in the following ejectment [351] suits against other members of the Palm Springs Indian Tribe: 3185, 3187, 3188, 3189, 3190, 3192, 3193, 3196, 3197, 3198, 3199, 3200, and 3201 in this court?

Mr. Preston: Let me see them. Before you answer it, let me look at those, will you? Where are the answers? I do not see any.

(Testimony of David D. Sallee)

Mr. Brett: I verified each one, for your information.

Mr. Preston: And that is the date of December, 1944. What is the question? I have forgotten what it is.

The Court: Let us not go over all that. What do you want to know about it?

Mr. Preston: We will stipulate that we filed answers in the cases recited and mentioned by the counsel in the fall of 1944; but we want it understood that we have the right to bring in here the list of cases also filed concerning these allotments at a later date.

The Court: Gentlemen, I can say I will take judicial notice of the records of this court, if you will call them to my attention.

Mr. Brett: That is satisfactory.

The Court: And give me judicial knowledge, I will take notice.

Q. By Mr. Brett: Mr. Sallee, you are familiar with Exhibits 7 and 8, the mimeographed form of agreements which have been offered in this case? [352]

A. Yes.

Q. Did you not procure the mimeographing of those agreements? A. I did not. (I did.)

Q. And did you not circulate all of those agreements among all of the members of the Tribe of Palm Springs?

A. No.

Mr. Preston: What is the answer?

A. No.

Mr. Preston: "No."

Q. By Mr. Brett: Did you not circulate those among quite a large number of them?

A. Quite a large number and signed them up.

(Testimony of David D. Sallee)

Q. You commenced that circulation of quite a large number in preparation for filing the answers in the ejectment suits, did you not?

A. I couldn't tell you the dates on them right now. They speak for themselves when they were signed.

Q. I have a letter here on the letterhead of David D. Sallee, dated December 28, 1943.

The Court: Perhaps counsel will stipulate with you that that letter was sent.

Mr. Preston: I don't know what it is. I have not seen it yet.

The Court: If you will be much longer, we will have to adjourn. [353]

Mr. Brett: No; I will not. This is the last thing I am going to offer. I realize that your Honor has been ill.

The Court: I have in mind the reporter. He has been sitting here quite a while.

Mr. Preston: I have no objection to the letter.

Mr. Brett: With that statement, then, I will ask Mr. Sallee if it bears his signature, since he is the witness on the stand.

The Court: Is that your letter, Mr. Sallee?

The Witness: Yes; it is.

The Court: Did you send it to the person addressed, on or about the date it bears?

The Witness: I did.

The Court: Offer it in evidence?

Mr. Brett: I offer it in evidence.

The Court: Received.

Mr. Brett: And, your Honor, I offer into evidence by reference—

The Clerk: Marked L.

(Testimony of David D. Sallee)

Mr. Brett: I offer into evidence by reference the complaint and answer, only, in the cases which I referred to in my next previous question to Mr. Sallee, beginning with 3185 and ending with 3201, offering the same by reference since they are records of the court.

The Court: Are they consecutively numbered? [354]

Mr. Brett: No. I will give them to you again. 3185, 3187, 3188, 3189, 3190, 3192, 3193, 3196, 3197, 3198, 3199, 3200, and 3201.

Mr. Preston: We have no objection to that, provided we have the same right to have the other cases that are on file in this court considered by the court and which relate to these allotments.

The Court: Is there objection?

Mr. Brett: None. But I think we might as well put them in. I have them here.

The Court: Very well. The files just listed and the cases just listed by Mr. Brett, being numbered in this court, are received into evidence by reference. You offered only the complaint and the answer?

Mr. Brett: That is right.

The Court: In those cases, received into evidence by reference, as Respondents' Exhibit M.

The Clerk: Generally M, your Honor.

The Court: M with sub-numbers for each case in consecutive order.

Mr. Preston: Counsel has presented, and I accept his offer as far as it goes, that causes Nos. 4401, 4402, 4403,

(Testimony of David D. Sallee)

4404, 4405 be admitted by reference for the purpose of showing that in the month of April, 1945 these suits were begun respecting the allotments. [355]

Mr. Brett: No objection.

The Court: Received into evidence as Petitioners' Exhibit 19—would it be, Mr. Clerk?

The Clerk: I believe so, your Honor.

The Court: With sub-letterings for each file in numerical order.

Mr. Preston: And I would like to have it understood that there are at least this many more, in my opinion, that are not here. The Hatchitt cases, for example, two of them are not here that I know of; and they all relate to the establishment of the rights of these Indians to their allotments.

The Court: If you desire, you may direct the court's attention to any other cases which are in this court and the court will, of course, take judicial notice of those records.

Mr. Preston: I desire to make another statement at this point, if your Honor please, that is: That I have, on behalf of my associates and myself, selected a lawyer in Washington and I have forwarded to him a mandamus proceeding or a proceeding in the nature of mandamus to compel the Government of the Indians to get busy to make some new allotments to these Indians, and the case is undoubtedly filed before this time. I have had one message

(Testimony of David D. Sallee)

to the effect that the papers had arrived, but I have not had any message that they have been actually filed. [356]

The Court: Any further questions of Mr. Sallee?

Mr. Brett: That is all the questions I have of Mr. Sallee.

The Witness: Just one minute.

The Court: Mr. Sallee has some question.

The Witness: Judge, I would like to call your attention to another question.

Mr. Preston: Well, Mr. Sallee, what statement was it you desired to make to me in connection with these suits?

The Witness: There is in my office today at least 10 or 12, I think it is, complete complaints that Judge Preston, Oliver Clark, and myself prepared on these allotments that have not been filed heretofore. I do not think we filed them all at that original time.

Mr. Preston: The object in taking these contracts was to pursue the remedy, if we could, that would give these Indians their allotments?

The Witness: That was true.

Mr. Preston: And it did not relate alone or at all, I suppose, to this question of ejectment?

The Witness: Not at all.

Mr. Preston: Not at all.

Mr. Brett: We will accept that as a stipulation. Well, that is his testimony. [357]

* * * * * * * *

OLIVER O. CLARK,

one of the petitioners herein, recalled as a witness by petitioners, being again sworn, was examined and testified as follows:

Direct Examination

By Mr. Preston:

Q. Mr. Clark, will you make a statement to the court?

Mr. Clark: Judge Preston, I am not sure that I was sworn. (The clerk again swore the witness.)

The Clerk: Please state your name.

The Witness: Oliver O. Clark, C-l-a-r-k.

Q. By Mr. Preston: Do you desire to make a statement of fact with respect to the matter that I have just presented to the court or in connection with it?

A. A very brief one.

Q. Go ahead.

A. Within a week or two after the filing of the ejectment suit against Lee Arenas, which I think is No. 3184-O'C in this court, I had a conversation with Lee Arenas in which I told him that the Government had commenced that [373] action and, for the purpose of getting possession of his allotted property from him for the benefit of the tribe, and that in support of the ejectment suit the Government was taking the position that the allotment to Lee Arenas was invalid; and that it presented identically the same issue, but in a different form procedurally, as the issue presented in his case against the Government.

In other words, in the ejectment suit the Government was assuming an affirmative of showing that the allotment was invalid and therefore he could not keep the property, and we would defend by showing it was valid, whereas in Lee's suit against the Government we contended that the

(Testimony of Oliver O. Clark)

allotment was valid and the Government was defending on the ground that it was invalid.

And I told him then that our services in the defense of the ejectment suit were a part of the services which we were rendering under our agreement with him in respect of the main litigation.

And I never said to Lee Arenas or to Mrs. Arenas or to anyone that the services of the ejectment suit were something apart or outside of the scope of our employment for which we would require any additional compensation.

And I never said to anyone, much less to them, that the last contract, the one in evidence here of 1945, was with reference to services in the ejectment suit. [374]

Mr. Preston: Cross-examine.

The Court: By that you mean with references solely to certain ejectment suits just mentioned?

The Witness: That is true, your Honor.

Cross-Examination

By Mr. Brett:

Q. Mr. Clark, you were aware of the fact that in this action you just referred to Marian Scott Arenas was named as a defendant? A. Yes.

The Court: By "this action you just referred to" you are referring to?

Mr. Brett: I am now referring to No. 3184-O'C which has been received in evidence as Respondents' Exhibit E prior to this.

The Court: Is that the ejectment action?

Mr. Brett: The ejectment action.

The Witness: Yes; I knew that and discussed it with both Lee and Marian.

(Testimony of Oliver O. Clark)

Q. Then you discussed this same matter that we have just referred to with Marian?

A. I told her that the reason she was joined was because the ejectment suit was a suit formed to recover possession, and since she technically was in possession of property, the Government had joined her. [375]

Q. And did you tell her that at the time that you procured the signatures to these two mimeographed contracts?

A. No. I told that to her at the time when I first spoke to Lee about the ejectment suits having been filed, because at that time they wondered why the suit was against Lee and Marian and not against Lee alone.

Mr. Brett: Just a minute. May I inquire of Mr. Taheny?

Mr. Taheny: Your Honor, may I ask some questions?

The Court: You may.

Cross-Examination

By Mr. Taheny:

Q. Mr. Clark, can you fix the date of this conversation?

A. I would say it was within a week or 10 days after the filing of that ejectment case, and that was in 1943, I think, in the month of December. But my recollection of the—

Q. According to the record here—

A. My recollection of the date is solely in respect of the approximate time after it was filed, when I talked with them.

(Testimony of Oliver O. Clark)

Q. According to the record which is here as an exhibit, it was October 4, 1943 when it was filed. And at that time you knew, did you, that a great many other Indians, probably 20 to 30, were also joined in the same suit as parties defendant? [376]

Mr. Brett: Of the same suit?

Mr. Taheny: In the same suit as parties defendant.

A. I don't remember now whether it was the same suit or separate suits, but I do remember that practically all of the allottees whom we represented were being then pursued by the Government in ejectment.

Q. There were several ejectment suits at that time?

Mr. Preston: 14, Mr. Taheny.

A. My recollection is that there was a separate suit as to each allottee, but I would not say that definitely.

The Court: By that you mean as to each person named in the 1927 list?

The Witness: Yes, your Honor.

The Court: That is the Wadsworth list of 1927?

Mr. Clark: That is right.

Q. By Mr. Taheny: And you appeared as attorney for all those who were served with summons in the ejectment suits?

A. I have no recollection of that, but whatever appearances were filed, why, of course I would appear as counsel for the defense.

The Court: Were you acting as counsel for all the persons who were sued in that series of ejectment suits?

The Witness: I would think so, your Honor, but I am not clear about it because it seems to me that another firm of lawyers represented one or two of the Indians whom we never [377] represented.

(Testimony of Oliver O. Clark)

Mr. Preston: Yes; that is true.

Mr. Brett: That is correct. That is true.

Mr. Preston: I remember that I filed 14 answers, your Honor.

The Court: Those actions are all in evidence by reference, are they not?

Mr. Preston: They are all right here.

Mr. Brett: Yes, your Honor.

The Court: The records will show if you want to check.

Mr. Clark: Yes, your Honor.

Mr. Taheny: I am just taking a few of them at random, your Honor. It appears that Mr. Preston and Mr. Clark and Mr. Sallee and Mr. Smith appeared and filed the answers in those various actions.

The Court: That is Mr. Clark's recollection, too, and Judge Preston has just observed that he recalls filing 14 answers.

The Witness: May I say, your Honor, that Mr. Smith is my son-in-law and had recently come to the Bar, and I therefore associated him in all of my litigation that he could get experience.

The Court: Any further questions?

Mr. Taheny: Yes.

Q. As regards these other Indians who were named at [378] that time, the suits against them were, so far as you can recall, suits of the same nature?

A. That is my recollection.

Q. At the time that these answers were filed for these other Indians, for example, the answer here in the Hatchitt case, did you have any contract with these other Indians prior to that time, any written contract, prior to the time

(Testimony of Oliver O. Clark)

that they were joined in this suit, any of these suits, about October, 1943?

A. We had a contract both originally and subsequently, in substantially the same form and substance and of substantially the same date as the contracts with Lee Arenas, with each of the other allottees.

Q. And what were the dates of those contracts?

A. That I am unable to say.

The Court: You say about substantially the same date?

The Witness: Substantially the same date.

The Court: In other words, you had a long contract with them such as the first contract you had with Lee Arenas, and then subsequently, in 1945, you had a short mimeographed form of contract such as you had with Lee Arenas?

The Witness: That is true, your Honor; and the difference in dates would be only the difference in getting to each of the Indians to get a signature.

Q. By Mr. Taheny: Then on or about the time that [379] these 1945 contracts were signed with Lee Arenas and his wife, other contracts were signed in the same form with the other parties to these ejectment suits?

A. That is true.

Q. You had no contract with Mrs. Arenas at any time, that is, no written contract other than this particular contract which is in evidence bearing the date of 1945?

A. That is true.

The Court: That is Exhibit 7, power of attorney and contract?

The Witness: That is true.

(Testimony of Oliver O. Clark)

The Court: And the earlier lengthy contract was November 20, 1940?

The Witness: That is true.

The Court: Exhibit 6 here.

The Witness: May I make one statement about the contract with Mrs. Arenas?

Mr. Preston: Go ahead, please.

The Witness: At the time when the matter of a contract with her was suggested, I stated to Mrs. Arenas that, while she was not an allottee and we then had no claim to present on her behalf or nothing to defend for her, but in view of the fact that Lee's health, by spells, was very bad and at one time during that period we thought he was going to die, in which event she would probably succeed to his estate, [380] that we thought we ought to have a contract with her which would be effective in event of Lee's death as to her inheritable interest in the property if the litigation had not previously been concluded. And that was the reason why, as I talked it with her, the contract with her was signed.

Q. By Mr. Taheny: But that contract with her was not signed, however, until the same time that you signed these contracts with the other Indians—

A. That is true, of a later time.

Q. —whom you were representing in ejectment suits?

A. That is true. We were also representing the other Indians in respect of the allotments that had been the subject of much discussion with the Government, and they had shown to us a letter from Washington saying that those allotments would abide the outcome of the Lee Arenas suit.

(Testimony of Oliver O. Clark)

Mr. Taheny: Your Honor, a moment ago you mentioned Exhibit No. 7. I believe the contract of Mrs. Arenas in respect of which I was questioning the witness is marked Exhibit 8.

The Court: Yes. That is the same form, though, is it not?

Mr. Taheny: The same form; that is right.

The Court: As Exhibit 7?

Mr. Taheny: That is right.

Q. This conversation that you speak of that you had with [381] Mrs. Arenas in which you suggested that she sign a contract because Mr. Arenas might pre-decease her, when was that discussion held; what date was that?

A. That was during the time that I was discussing with Lee Arenas and his wife the advisability of bringing Judge Preston into the litigation and making a new contract covering our compensation.

Q. Did you have anything to do personally with the signing of the contract marked Exhibit 8?

A. Which one is that?

Q. That is one Mrs. Arenas signed.

A. I have testified as to what I had to do with it.

Q. Well, after this conversation that you had with Mrs. Arenas in 1943 concerning the bringing in of Judge Preston did you have any further conversation thereafter with Mrs. Arenas in regards to her signing this document, Exhibit 8?

A. It is my recollection, but it is very dim, that Mrs. Arenas was present with Lee Arenas when I spoke to Lee about the time had now come when we should reduce our oral understanding to writing, and that at that time, in substance, that I said to her that that would cover both

(Testimony of Oliver O. Clark)

our understanding with her and with Lee Arenas, hers covering the contingency of Lee's death and her inheritance. I remember no other conversation at this time with her. [382]

Q. Then do I understand your testimony to be, then, that you had no conversation with her after 1943, the year 1943, between that time and the time she signed this contract, Exhibit 8, in 1945?

A. Well, as I say, I do not know the conversations to which I have last testified occurred at the time of the signing of the contracts, but it was about that time. It was the time when I suggested to Lee and Marian that we should now reduce our oral understanding to writing, and that was about the time when the second writing was signed, but I couldn't say it was on that day.

Q. Well, the actual obtaining of the signatures by Mr. and Mrs. Arenas was, I noticed, by Mr. Sallee, was it not, in the 1945 contract? A. Yes.

Q. And you were not present at the time they were signed, were you?

A. Oh, yes; I was. I was present when Lee and Marian signed the last contract. I was not present when Lee signed the first contract in evidence here.

The Court: Any further questions, Mr. Taheny?

Mr. Taheny: Yes, your Honor.

Q. Now, at the time this was signed did you have anything to do with the drawing up of that 1945 contract, the phraseology of it?

A. Yes. That is the later contract? [383]

(Testimony of Oliver O. Clark)

Q. Yes. A. I think I prepared it.

The Court: We have covered all this territory before.

Mr. Preston: It is all in the statement here, the Interrogations, Exhibit 4.

Mr. Taheny: Let me ask you this: At the time Mrs. Arenas signed that contract, that 1945 contract, is it your testimony that she was asked to sign that solely so that you would have something in writing signed by her in the event she survived her husband while this litigation was pending?

A. Not at that time. I don't think it was mentioned at that time, but that is the substance of what I said to her earlier, when the ejectment suits had been filed, that we should have a writing with her substantially the same as with Lee, to abide the contingency of his death and her inheritance.

Mr. Taheny: I believe that is all.

Mr. Brett: Your Honor, I have one question not in cross-examination.

The Court: One?

Mr. Brett: Just one question.

The Court: Very well.

Mr. Brett: I would like to ask if I may use Mr. Clark as a witness on behalf of Arenas for this one question only, because I think that I can't rely on the book. [384]

Q. Mr. Clark, in the report of the Arenas case decided by the Supreme Court, in 88 Law Ed. at pages 1373

(Testimony of Oliver O. Clark)

and 1374, it is indicated in the reporter's notes of the briefs by both sides and of the appearances that, in addition to Judge Preston appearing and arguing the case, you also appeared and argued the case; is that correct?

A. Yes; I did. We divided the case into two parts. Judge Preston opened the argument on the question of the statutory liability, I followed on the question of estoppel, and I presented the rebuttal argument at Judge Preston's request in relation to the entire case. That was my first and only appearance before that court.

The Court: Any further evidence, gentlemen? [385]

* * * * * * * *

The Court: During the noon hour I wish you would think of this: If we are to consider policy, should not the court be on the liberal side of what is reasonable? I mean laying aside the question of whether that first contract fixed the limit, the maximum limit; assuming it does not, should not the court be on the upper side of what is reasonable in order to encourage lawyers, in view of the history of this situation, to encourage lawyers to aid these Indians who manifestly need assistance to handle the Secretary of Interior, if policy is to be considered?

* * * * * * * * *

[Endorsed]: Filed Jan. 3, 1949. Edmund L. Smith, Clerk. [497]

[PETITIONER'S EXHIBIT NO. 4]

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In the District Court of the United States, in and for the Southern District of California, Central Division.

Lee Arenas, Plaintiff, vs. United States of America, Defendant. No. 1321-O'C Civil.

INTERROGATIONS

Pursuant to a Stipulation dated January 28, 1948, entered into between petitioners John W. Preston, Oliver O. Clark, and David D. Sallee, and respondent United States of America, and Lee Arenas (by United States of America), the following testimony was taken at a conference held in the law offices of John W. Preston, Esq., 712 Rowan Building, Los Angeles, California, on January 28, 1948, at two o'clock p. m., in connection with the above entitled action.

Those present and participating in the conference were: Messrs. John W. Preston, Oliver O. Clark, David D. Sallee, and Irl D. Brett.

(Petitioner's Exhibit No. 4)

Mr. Brett made the following interrogation of Mr. David D. Sallee:

(Judge Preston handed Mr. Brett, in the presence of Messrs. Oliver O. Clark and David D. Sallee, a document entitled "Statement of Facts" in reference to the services performed by them, and each of them, in the case of Lee Arenas vs. United States.)

Q. As I understand it, Mr. Sallee, the Statement of Facts, which has just been handed to me, consisting of eight pages and reciting certain facts respecting your activities as set forth in the Petition upon which the Order to Show Cause is based, may be deemed, for the purpose of the Stipulation, a statement of facts as you would testify to them in connection with what you did as attorney for Lee Arenas in this case? A. Yes.

Q. You have shown me the original of a document which bears the date of November 20, 1940, which recites that it is an agreement between Lee Arenas and David D. Sallee. Now, was that document executed in more than one original? A. Yes; two.

Q. Were both sgined and acknowledged in the form in which you have submitted a copy to me? A. Yes.

Q. Were you present, Mr. Sallee, when Lee Arenas affixed his signature to that document—when he signed both originals?

A. Yes, in the court room of Judge McCormick, before Judge Paul J. McCormick.

Q. Lee Arenas was there?

A. Yes, and on the stand for about two hours.

Q. Was there any transcription of his statements or testimony at that time? A. I doubt it.

(Petitioner's Exhibit No. 4)

Q. Who were present besides Judge McCormick and Lee Arenas and yourself?

A. A man by the name of Collett, who is in Washington at the present time. There were two or three Indians too, I think, but it has been so long ago I can't remember exactly. Eugene Graves was in the court room that afternoon.

Q. Were the clerk and bailiff there? A. Yes.

Q. How did the proceeding originate, how did you get before Judge McCormick?

A. I don't remember whether the clerk took it in there or whether he let me go in there to see Judge McCormick personally and ask him to make an ex parte matter of it. It was over seven years ago and those details are gone now.

Q. Was any member of Lee Arenas' family present besides himself?

A. I don't know whether he was married to his present wife at that time or not, I don't think so, but if they were married, she was there. If they were not married, there was no other person there.

Q. It is not contended that there was any legal proceeding then pending in the District Court to which Lee Arenas was a party?

A. No, the suit hadn't been filed. The suit was filed December 20th, and this was November 20th.

Q. My question is this, Mr. Sallee: There was no proceeding in the District Court at Los Angeles that was pending at the time of this hearing before Judge McCormick in which Lee Arenas was a party?

A. This proceeding was had under the procedure of the rules and regulations of the Interior Department and

(Petitioner's Exhibit No. 4)

the Indian Department to have a contract validated before a local Judge.

Q. Was it required to comply with Section 2103 of the Revised Statutes? A. I would have to read it.

Q. I was referring to the one mentioned in the contract. A. I expect it is, yes.

Q. Before this meeting in Judge McCormick's court room, had you had any conversation with Lee Arenas about the making of this agreement? A. Yes.

Q. And where did you have this conversation?

A. The first one was in the office, in my office in the Garfield Building, the day he came in and asked me to check his case for him, that was the first time I had met him.

Q. Can you fix it with reference to this date, not necessarily the exact date?

A. Just a short time—probably six weeks or thirty days, I can't tell you, I don't just remember.

Q. And at that conference who were present?

A. Just him and myself at the first conference, the second I called Mr. Clark and he came downstairs to my office. We had the same reception room at that time and I buzzed him and he came in.

Q. This second conference was before you went to Judge McCormick with the agreement?

A. Yes. I want to correct what I just said that Mr. Clark was in the same office with me then. I had just moved down into my new quarters a short time, and he came downstairs, that's right.

Q. At this second conference who were present, Mr. Lee Arenas, Mr. Oliver, and yourself? A. Yes.

(Petitioner's Exhibit No. 4)

Q. Was the conference extended or short?

A. Short.

Q. Would you mind summarizing the gist of the conference?

A. The gist was we would have to get into agreement for a written contract so that we could have the authority to go ahead and represent him, he saying at all times he didn't have money to pay lawyers, that we would have to look to the property to get our pay.

Q. You would have authority—what do you mean? Was any mention made in that conversation about regulations of the Government?

A. Presume there was, I couldn't remember that detail now.

Q. You don't remember what representation or mention was made? A. Not specifically.

Q. You were there approximately two hours before Judge McCormick? A. Practically.

Q. Was there a reporter present?

A. I can't remember.

Q. Was there a clerk present? A. Yes.

Q. At the close or conclusion of that session were any documents signed by Mr. Arenas or by you? Or by Judge McCormick? I mean, other than the document consisting of twelve pages, and a copy of which has been furnished to the Government?

A. None other—that is, outside of what the Court might have—these two copies were signed in the court room. Lee Arenas signed, I signed, and then Judge McCormick signed, and I think Mr. Zimmerman signed them.

Q. That is the document that makes up these twelve pages? A. Yes.

(Petitioner's Exhibit No. 4)

Q. Your testimony is, however, that other than those twelve pages, nothing else was signed by either you or Mr. Arenas or the Court that you recall?

A. Not at that time.

Q. Who prepared the document called the "agreement"?

A. I prepared the rough outline, then Oliver Clark and I went over it together, and he detailed it, and it was probably edited three or four times before its final form.

Q. Was it ultimately drafted in your office and under your supervision? A. Yes.

Q. Was it discussed with Mr. Arenas before you went with it to Judge McCormick? A. Yes.

Q. Where?

A. I don't remember. The first conference was out at his home under a tree, with Mr. Clark and me. We called on him, or in my office, I don't just remember, we had two or three conferences over the matter. Mr. Clark was in on a couple or three of them, and a couple of them I went over the outline with him myself, explaining it in detail.

Q. Was Mr. Clark present when these conversations took place? A. Two or three of them, yes.

Q. With reference to the provision that appears on the first page, lines 11 to 16, and which recites that the first party—that would be Mr. Arenas—"hereby contracts with, retains, and employs the party of the second part as attorney in the matters hereinafter mentioned, subject to the approval of the Commissioner of Indian Affairs, and the Secretary of the Interior, pursuant to Section 2103 of the Revised Statutes of the United States

(Petitioner's Exhibit No. 4)

of America," what did you state to or explain to Mr. Arenas?

A. I can't give you the details, but the sum and substance was that if I was to do his work I wanted a contract executed by him and approved by the Court, whereby fees could be obtained later on if and when litigation turned favorable to him, that's the gist of it.

Q. Did you or did you not tell him that the agreement would not be effective until it was approved by the Commissioner of Indian Affairs or until it was approved by the Secretary of the Interior?

A. I told him I would send the contract in to be approved, which I did after the Court had approved it here.

Q. Yes, Mr. Sallee, but did you tell him that it would not become effective until approved by the Commissioner of Indian Affairs or the Secretary of the Interior?

A. I didn't tell him, because in my opinion it was effective all the way through.

Q. Is it your recollection that, at the hearing before Judge McCormick, that particular clause was referred to either in interrogating Mr. Arenas or in speaking to the Court, or making representations to the Court, or answers to questions of the Court?

A. I didn't go into details of the contract, but Judge McCormick took the contract and read it paragraph by paragraph and interrogated Mr. Arenas himself.

Q. Mr. Clark was not present?

A. No, he was in a trial and couldn't be there.

Q. And Judge Preston wasn't associated in the case then? A. No.

Q. Was there any reason why you were the only one who was named? I mean, was there any reason expressed

(Petitioner's Exhibit No. 4)

by you or Mr. Arenas or by Mr. Clark, or anyone else, as to why you were the only party—

A. The only explanation is this: Tom Sloan and I had known each other in the past. Tom came down to ask me to be associated with him in the Ste. Marie case, that was the first time Oliver knew anything about the Indian case. Tom told the Indians out there that I was to be associated with him, and when Lee later came into the office that was the first time I met him after I had been out there interviewing the other Indians at the request of Tom Sloan. Lee Arenas said to me: "I have been wanting to meet you. Me hear lot about you. Me want you my lawyer. Me want you file my case for allotment." I said: "All right, I will do it." I don't remember whether Mr. Clark—if I called him and he came in at the first conference or not, I doubt it, but the next conference he was in on. But at the request of Mr. Clark he told me "you take that contract in your name, it would be easier for you to handle all the details here because you won't have to hunt me up for signatures, but you have the power of your associates anyway, you take the contract in your own name."

Q. Going back to the hearing before Judge McCormick—so far as your recollection serves you, having in mind it has been quite a while, did Judge McCormick interrogate you or Lee with respect to the paragraph which is the second paragraph of the agreement, and which refers it to being subject to the approval of the Commissioner of Indian Affairs and the Secretary of the Interior pursuant to Section 2103 of the Revised Statutes?

A. I don't remember any specific questions at this time.

(Petitioner's Exhibit No. 4)

Q. Between the 20th of November, 1940 and 1st of February, 1945, were there any other writings which were executed by Mr. Lee Arenas and you, or Mr. Lee Arenas and you and Mr. Oliver O. Clark, or Lee Arenas and you and Mr. Oliver O. Clark and Judge Preston which were in the nature of agreements for employment, as distinguished from correspondence or checks or remittances or bills?

A. On February 1, 1945 the modified contract was signed.

(Judge Preston: The question is between the time—)

A. Between the time, no.

Q. I note that the duplicate original, which Judge Preston has handed me, as well as the copy which was furnished to me, discloses the affixation of a stamp of the Office of Indian Affairs on page 1 between lines 8 and 11, which reads: "Office of Indian Affairs, received January 14, 1941," and there is also impressed in heavier type the numbers 2520. So far as you know, was both that stamp and number impressed by the Office of Indian Affairs? A. So far as I know.

Q. Prior to that date was one of these documents, or more of them, mailed to any official of the United States Government?

A. On January 2, 1941, I handed to Carl Spinner, Principal Clerk in Charge, at the Riverside Agency, a letter, together with three of these copies, all executed by Lee Arenas, and all executed by Judge McCormick, and attested by the clerk, and signed by me.

Q. Do you have in your hands a copy of the communication? A. Yes.

(Petitioner's Exhibit No. 4)

Q. I note that this carbon copy of letter dated January 2, 1941, is addressed to Mr. John W. Dady, Superintendent, Mission Agency, Riverside, California, and said in re Lee Arenas, etc., and has a stamp mark "Received January 9, 1941, Mission Agency", with the signature of Carl Spinner, and stamped "Carl Spinner, Principal Clerk in Charge". The receipt stamp, together with Mr. Spinner's signature, was affixed in that office in your presence?

A. Yes.

Q. Will you undertake to have some copies made, please, for the purpose of this matter, noted as Exhibit 1?

A. Yes.

Q. Now, Mr. Sallee, between November 20, 1940 and January 9, 1941, which was the date of the receipt of the letter of January 2, 1941, which we have just marked Exhibit 1, were there any other letters or other form of writings executed by you, or to your knowledge by Mr. Clark or anyone else as your associate, directed to any official of the United States Government in respect to this agreement of November 20, 1940?

A. Not that I remember right now.

Q. Did you receive any communication in writing from any representative of the United States Government in response to the letter of January 2, 1941, and with relation to the document designated "Agreement" and dated November 20, 1940? A. Yes.

Q. Do you have that?

A. No, I would have to locate it.

(Petitioner's Exhibit No. 4)

Q. Without precisely fixing it, can you state approximately how long after January 9, 1941 you received the communication and from whom?

A. Probably a year or so, because I had from time to time asked Mr. Dady if he had heard anything, and he said "no", and on November 11, 1942, I addressed a letter to him, and on November 16, 1942 I sent another letter to him about it. It was some time later that—I can't say how long—that I received a letter from Washington relative to it, and I have endeavored to find that letter, but have been unable to find it to date.

Q. As I recall your statements, it would have been after November 16, 1942? A. Yes.

Q. Do you recall from whom you received the communication?

A. It was one of the officials in the Department.

Q. The Department of the Interior, Indian Affairs?

A. Yes, Indian Affairs I think, the department that handles contracts.

Q. Do you recall, generally, the contents of the communication?

A. Just the substance. That they had refused to accept my contract at this time, stating that this litigation was on and that if favorable, the contract was good against Lee Arenas anyway. However, as I remember, it was not an absolutely flat denial, except in substance "we can't approve it" and went on and stated that it was a one-page letter or page-and-a-half, I can't just remember exactly.

Q. You have stated that prior to your receipt of that communication, the substance of which you have just given to the best of your recollection, you had delivered

(Petitioner's Exhibit No. 4)

or mailed to Mr. Dady two other communications. Do you have carbon copies of them? A. Yes.

Q. Mr. Sallee, you have shown me a carbon copy of a communication dated November 11, 1942 to Mr. John W. Dady, Superintendent of the Indian Agency at Riverside, the original of which you delivered to Mr. Dady. You have also shown me a copy of a letter addressed to the Department of the Interior, Office of Indian Affairs, dated November 16, 1942, Washington, D. C., in re Lee Arenas vs. United States of America, and that communication was mailed through the United States mails to that office?

A. Yes.

Q. May these be annexed as exhibits, Exhibits 2 and 3 please? A. Yes.

Q. Mr. Sallee, when you received this reply that you have roughly described, did you communicate its contents to Mr. Clark? A. Yes.

Q. Did you communicate its contents to Judge Preston at any time?

A. At that time he wasn't in the case. I don't know whether I told him they had been turned down or not.

Q. I have written to the Department to see if they could dig up for me the originals or copies of certain correspondence. I am assuming that they will dig up this communication. May it be stipulated between us that if I get it in time I will submit it to Mr. Sallee, and it may then be incorporated in lieu of his oral statement after he has identified it?

A. Yes. One further statement. As I remember, in that letter, it was a letter subsequent to that, they retained one copy there for their records. They do have one of these copies there.

(Petitioner's Exhibit No. 4)

Q. Following the receipt of that communication and prior to the time that you received the three duplicate originals from the office of Indian Affairs—they having retained one copy as you have just stated—did you have any further written communications with the Office of Indian Affairs or with any official of the Department of the Interior or any other official of the United States Government in connection with this particular matter and the document dated November 20, 1940?

A. I can't answer that definitely. I did have some correspondence with one firm of lawyers in Washington relative to it. I am going through my files, getting this in chronological order so that I can give it to you.

Q. Is it the import of your last answer that you attempted to make arrangements with some local representatives in Washington, D. C. to contact one or more Government representatives in connection with this matter?

A. I started out to have someone represent me there so that I would not have to make a trip back there.

Q. You did not obtain that representative?

A. No, that's as far as it went.

Q. Did you have any oral conversation with any representative of the Government in connection with this document dated November 20, 1940, following the receipt of the communication which you have been unable to describe?

A. None other than with Mr. Dady at Riverside.

Q. Approximately when was that with reference to when the documents were returned to you—before or after?

A. Before and after both, because from time to time I would see him, and I would bring up the question.

(Petitioner's Exhibit No. 4)

Q. And what was the gist of the question?

A. What the dickens was the matter that they wouldn't come through in a decent way with the approval of those contracts!

Q. What was Mr. Dady's reply?

A. He didn't think we had a good case, that was the sum and substance of it.

Q. Was anybody present besides yourself and Mr. Dady? A. No.

Q. At the time you received the communication, which you have roughly described but have not been able to locate and produce, did you at the same time and with that document receive back the two originals?

A. The originals came back later.

Q. Briefly, my question was—when they were returned to you, were they accompanied by any written communication from the Government?

A. Yes. I think a short letter saying "we are returning herewith the two original contracts", something like that.

Q. Do you have the communication in your file?

A. I should have it. I will give it to you. I didn't have a chance to get my things together.

Q. May it be stipulated that if Mr. Sallee can locate it, that a copy may be annexed and marked Exhibit 4 to this statement?

(Mr. Preston: And also to the other communication, the contents of which he has described.)

(Mr. Clark: It is agreeable.)

Q. Mr. Sallee, when Mr. Arenas executed this document dated November 20, 1940, did he deliver to you any monies? A. No.

(Petitioner's Exhibit No. 4)

Q. At any time thereafter and up to the present time did Mr. Arenas deliver any monies to you?

A. Different amounts from time to time, yes.

Q. Have you made a practice, Mr. Sallee, of keeping a book record of this account? A. No.

Q. Have you any form of written form of memoranda or record of amounts which were delivered in your hands either directly by Mr. Arenas, or so far as you were informed, purported to be made by or for Mr. Arenas in connection with this particular case?

A. I am getting, as soon as I can, a statement of those amounts, going over my receipt books and paid bills.

Q. You mean you are having it transcribed?

A. No, I can give you a detailed statement of it, see what it amounts to.

Q. And are you also intending to make a detailed statement, so far as you can, of what amounts you expended from the amounts you received? A. Yes.

Q. May it be stipulated, gentlemen, that as soon as Mr. Sallee has accomplished that result, that a copy of that statement can be annexed and marked as the next exhibit in order? A. Yes.

Q. Would you have any objection, Mr. Sallee, to making just a short written certification to the best of your recollection and information that these consist of all the amounts expended in behalf of this litigation? I don't know if you are required to do it or not, but—

A. I reserve that until I get it made up.

Q. If you decide that you are agreeable, may it be added to the exhibits? A. Yes.

Q. So far as you are informed, Mr. Sallee, were any monies obtained or received from Mr. Arenas directly or

(Petitioner's Exhibit No. 4)

indirectly, and by indirectly I mean advanced or made available by someone else purporting to act in behalf of Mr. Arenas, to anyone other than yourself in connection with this particular litigation?

A. That I don't know.

Q. So far as you know, was any compensation, in any form, either money or any other form, paid to any person other than yourself, up to the present time, by Mr. Arenas, directly or indirectly, aside from advances or costs and expenses which you intended to set forth in your account?

A. Not that I know of, I couldn't tell you what has been done.

Q. Have you received any monetary payment from Mr. Arenas, directly or indirectly, to be applied on account of fees as distinguished from costs and expenses?

A. No.

Q. Now, have you ever, at any time, prepared an offer to furnish or submit to Mr. Arenas personally, or to anyone in his behalf, any record of your account in the way of a statement or voucher in respect to the expenses which you incurred and paid?

A. That question has never arisen at any time.

Q. It is stated in the document dated November 20, 1940, commencing on page 5, line 24, and ending on page 6, line 14:

> "It Is Further Understood that in event the Party of the Second Part, or his associates who are actually associated in the litigation and investigation as aforesaid, shall advance any necessary expenses, they shall be reimbursed by the Party of the First Part, from the property recovered, such actual expenses as are

(Petitioner's Exhibit No. 4)

> strictly necessary or proper in connection with the printing of briefs, court costs for proceedings and other similar matters, and to include such actual and necessary traveling expenses, clerical hire, stenographic expense, and the like as may be properly required for the prosecution of said case, or cases; provided that all such expenditures shall be itemized and verified by the Party of the Second Part, and shall be accompanied by proper vouchers, and shall be only upon the approval of the Secretary of the Interior, or an officer designated by him who shall certify the same."

Have you at any time prior to the filing of the Petition or at any time subsequent to the filing of the Petition and up to the present moment, prepared any vouchers or other writings setting forth the detail of expenditures made by you, and verified the same and submitted them for approval to the Secretary of the Interior? A. No.

Q. Or submitted them for approval to any other official that the Secretary of the Interior had designated?

A. No.

Q. Have you ever requested the Secretary of the Interior to designate any official? A. No.

(Mr. Preston: That would be only if you wanted to collect them.)

Q. It is provided in the same document dated November 20, 1940, Mr. Sallee, commencing on page 6, line 15, and ending on page 7, line 13, as follows:

> "It Is Further Understood and Agreed by and between the parties of this Agreement, that in event of a misunderstanding as regards the manner in which the compensation to the Party of the Second Part

(Petitioner's Exhibit No. 4)

from the Party of the First Part shall be paid; and Trust Patents or receipts have been issued, and in that event the Party of the First Part shall thereupon make application for a removal of restrictions upon sufficient of the premises to be sold, and from the proceeds of said sale or sales to pay said Party of the Second Part; that in event it is not for the best interests of the parties hereto to sell said land, the removal of restrictions shall be applied for upon properties coming to the First Party, as selected by said Second Party, upon the basis of one-tenth of the property—That is to say, Second Party shall select one property that does not exceed ten per cent of the total value of all properties, and that First Party shall select nine properties that do not exceed ninety per cent of the total value of said properties, and continue to make such selections until all property shall have been selected. That the property selected by the Second Party shall then be deeded to said Second Party, subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs."

Was that paragraph discussed between you and Mr. Arenas before he signed it? A. Yes.

Q. What did you tell Mr. Arenas?

A. I explained the wording of it, and it was also explained by Judge McCormick to Mr. Arenas.

Q. You at that time, Mr. Sallee, were somewhat well grounded in the Indian law that existed, were you not?

A. Just fair.

Q. You had made examinations of the law?

A. Oh yes.

(Petitioner's Exhibit No. 4)

Q. Had you not discovered that the particular property was covered by express provisions of the Congress so that the restrictions could only be moved by the Department of the Interior? A. That's right.

Q. Did you so inform Mr. Arenas? A. Yes.

Q. And you so informed Judge McCormick? In answer to his question?

A. I informed him, and he also made that very same statement.

Q. Has any trust patent been issued as to these lands?

(Mr. Preston: They don't have to. The law says a certified copy of the decree is a trust patent.)

Q. Assuming that Judge Preston's statement is correct, have you made any application in any form in behalf of Lee Arenas for release of restrictions on this property?

A. Not at the present time.

Q. Have you made any selections of any portion of the properties which were the subject matter of the judgment in this case as at least your anticipated selection?

A. No.

Q. Have you requested Lee Arenas to make any such selection?

A. Haven't been able to get to see him lately.

Q. Have you communicated with him in an effort to arrange for such selection?

A. No, not by written communication.

Q. Have you in any manner, either orally or in writing, presented to the Secretary of the Interior or other Commissioner of Indian Affairs, a request for approval of any such selection? A. No.

(Petitioner's Exhibit No. 4)

Q. Have you made any assignment orally or in writing of your interest in this agreement to anyone?

A. Just my associates, that I would give them an interest in it.

Q. That was in writing?

A. No, I walked off and forgot it, I had three copies made.

Q. When were the assignments made?

A. When Judge Preston came into the case, I forget the date, Mr. Clark dictated the assignment.

Q. They were in writing and signed by you and delivered to Mr. Clark and Judge Preston?

A. They were put in a file that Mr. Clark and I had, and not to Judge Preston, because Oliver said he had them at one time, he put them in that file.

Q. Were those assignments submitted to either the Commissioner of Indian Affairs or the Secretary of the Interior? A. No.

Q. Were they ever requested to consent thereto?

A. No.

Q. Of course their consent was never obtained?

A. No.

Q. With reference to two documents which I believe are identical in their text and are both dated February 1, 1945, identical with the exception that one is signed by Lee Arenas and the other by Marion Therese Arenas. Judge Preston has furnished me with copies of such documents and has exhibited to me the originals. Who drew up those documents?

A. I started the draft of those, and the same way with the original contract, it was redrafted four, five, or six

(Petitioner's Exhibit No. 4)

times by Mr. Clark and myself, and the final draft was his redraft of the one that we had done before that.

Q. Were these documents signed on the day they were shown, February 1st? A. Yes.

Q. And were you personally present when Lee Arenas and Marion Therese Arenas signed them?

A. I was. And so was Mr. Clark.

Q. Where were they signed?

A. In my office in Los Angeles.

Q. Was Lee present at the same time, and did they sign in each other's presence? A. Yes.

Q. That was the day following the conclusion of the trial, the second trial, before Judge O'Connor?

A. I don't know—the day following or during the trial.

Q. I think the Statement of Facts shows that that trial was conducted on January 30th and 31st.

A. Let me clarify that one date, since you called my attention to the other. The notary on that is Benton Beckley. Mr. Beckley was at the trial, and whether or not he put his signature on that the day they were actually signed in my office, I do not remember. I know I handed them to him to be notarized. The four of us were sitting there, Mr. Clark, Mr. Arenas, Benton Beckley, and myself. We were all in my office and we had discussed with Lee before that the provisions of this modified contract and the reasons why, and he had agreed to it. That was done some little time before that. Mr. Clark had been quite emphatic in getting all of those details before Mr. Arenas' attention so that he would thoroughly understand it, and the reason why we were asking for a larger percentage, and after it was all explained to Arenas he was perfectly satisfied and so was Marian Therese Arenas at

(Petitioner's Exhibit No. 4)

that time. It might have been signed on February 1st or the day before, I don't remember exactly, and whether my day book will show that I don't know. The notary might have put that date in there himself, I don't know. That's the point I want to bring out.

Q. Lee Arenas was present and testified at the trial, and also Marian Therese Arenas? A. Yes.

Q. And was Beckley present too? A. Yes.

Q. Did he testify?

A. I don't think so. Benton Beckley had done a lot of work for the Indians and quite a lot for Lee, and whenever they needed him or anything was going on, he was on hand.

Q. Is it your testimony that you were present when these signatures were acknowledged by Benton Beckley?

A. I don't remember if he put his seal on in my presence or not, I know he signed in my presence. I don't remember about the seal.

Q. Now, what conversation did you have with Lee, that you have just referred to, shortly before he and his present wife signed the documents which bear the date February 1, 1945, respecting the reasons for the execution of such documents?

A. Most of that conversation was conducted by Mr. Clark and Mr. Arenas after I had opened the question.

Q. Mr. Clark was present? A. Yes.

Q. Where was the conversation?

A. We had several, some in my office, and I think one or two in Palm Springs.

(Petitioner's Exhibit No. 4)

Q. And in every instance was the present Mrs. Arenas present?

A. I can't swear to that—I can't say whether she was in on all of them at Palm Springs. Some times I would see Lee and she wouldn't be at home, but in my office she was there.

Q. I assume, Mr. Sallee, that Lee Arenas wouldn't know what quantum meruit meant? Or did you tell him?

A. Yes I did. And so did Mr. Clark.

Q. What did you tell him?

A. The reasonable value for services—that the Court would set the fees accordingly.

Q. I don't like to lead an attorney, but—

A. I am a poor witness, I know.

Q. As a part of that conversation, did you tell him that it was the considered opinion of you gentlemen, in view of what had been done and was needed to be done, that ten per cent would not be a reasonable fee?

A. Correct.

Q. Did you tell him what would be a reasonable percentage? A. I did not.

Q. Did Mr. Clark?

A. Not in specific figures, no.

Q. Did Mr. Arenas or his wife ask? A. No.

Q. Had Judge O'Connor made any statement in the court proceedings of January 30th or 31st, and prior to the time that this document was signed, in which he had announced his conclusion as to what way he would find?

A. Not to my knowledge.

Q. Other than your belief that you had a good cause and such other conclusions as you might draw, you had

(Petitioner's Exhibit No. 4)

no definite indication or knowledge how far this matter might go? A. That's right.

Q. You stated a moment ago that Mr. Clark had, on several occasions, indicated clearly to Mr. Lee Arenas that the previous arrangements were unsatisfactory in amount, and for that reason you had to have some other arrangement? A. That's right.

Q. Did Mr. Clark express either in money or percentage, or in any other comparative form, what he and you ever contemplated to be fair and proper as compared to the previous agreement?

A. I never heard him quote a figure. He made the statement: "You know, Lee, we are having to do considerable extra work, and Judge Preston is in the case now, and we have to make arrangements to take care of these fees in a proper way."

Q. Judge Preston conducted the second trial?

A. Yes.

Q. In this particular one-page agreement with Lee Arenas and also the same document with Mrs. Arenas, there is this statement in the last line of the first paragraph thereof: "All to be subject to the rules and regulations of the Department of the Interior." So far as your recollection goes, was any discussion had with Lee respecting that sentence and the import thereof?

A. Not that I remember.

Q. Was this document dated February 1, 1945 ever submitted to any representative of the Government?

A. No.

(Petitioner's Exhibit No. 4)

Q. I take it, then, no request was made for approval or consideration? A. No.

Q. And that document was not submitted to any Judge? A. No.

Q. Mr. Sallee, other than the three writings, the one dated November 20, 1940, in which you are named as second party, and which bears the signatures of Lee Arenas and yourself, and the two duplicate documents, each dated February 1, 1945, which are identical except as to the name of the client, one of which was signed by Lee Arenas, and the other by Marian Therese Arenas, were any other writings executed by you and by Lee Arenas covering or purporting to cover an arrangement, contract, or agreement for legal services in connection with this property? A. No.

Q. Mr. Sallee, at the time that you entered into this first instrument or agreement with Mr. Arenas, either immediately on that date or as a part of the surrounding circumstances, did you get similar contracts from other members of the Band and receive compensation from them as a part consideration for this transaction?

A. Referring to November 10th? November 20th? No.

Q. In other words, you did not receive from any other member of this Tribe or from someone in their behalf, any fees or advances in connection with the Lee Arenas case?

A. From time to time contributions towards costs on this, but no fees.

Q. I think that's all, Mr. Sallee.

DAVID D. SALLEE

(Petitioner's Exhibit No. 4)

INTERROGATION BY MR. BRETT OF MR. OLIVER O. CLARK

Q. Is there any difference, Mr. Clark, that you can now recall, in what your answers would be in so far as what took place in any conversations in which you participated than as stated by Mr. Sallee?

A. Yes, in several instances. I noted as he testified conversations were had that I recall which he did not testify to, and some things were just a little bit different as he recalled them in so far as my participation is concerned.

Q. With that in mind, I will ask a few questions. When were you first informed about this matter? When did you first take active part?

A. Late June, in the year in which the suit was filed. I think 1940.

Q. And were you introduced to Mr. Arenas by Mr. Sallee?

A. Not at that time. I was later. My best recollection would be during the first two weeks of July.

Q. And where did you first meet Lee Arenas?

A. In Dave Sallee's office.

Q. Were there conversations at that time with Mr. Arenas? A. Yes.

Q. Who were present?

A. Dave Sallee and myself and Lee Arenas.

Q. And the woman who is known as Marian Therese Arenas was not present at that time?

A. I think not, not until a considerable time later.

(Mr. Sallee: At that time Lee Arenas wasn't married, when we first handled the litigation.)

(Petitioner's Exhibit No. 4)

Q. Mr. Clark, I am not intending to interrogate you concerning the general setup of your work—just as set up in the Statement of Facts—only with matters that concern the ultimate arrangements and execution of the agreement of November 20. I will ask you then: At that particular time was the matter of employment by Mr. Arenas and of the compensation for such employment discussed with Mr. Arenas?

A. As to the employment, yes. Compensation, no.

Q. Will you briefly state your recollection of what was said at that time?

A. Yes. Lee Arenas shook hands with me and said: "Mr. Sallee tell me you help on my case." And I told him that I was just beginning to make a study of a great deal of material that they had begun to furnish me, and would furnish to me, and that if, when I had occasion to look more fully into that material, I felt that he had a reasonable chance to win the case, I would then associate with Dave Sallee in the case for him.

Q. I take it then, that, so far as that particular conference was concerned, that is as far as it went with respect to employment? A. That is true.

Q. When, with reference to the agreement dated November 20, 1940, did you next have a conversation with Mr. Arenas?

A. I had several conversations with him, both in Los Angeles and at his home in Palm Springs, about the facts of his case, but nothing further as I now recall with reference to compensation until perhaps within a week or so of the time when the first contract was signed.

(Petitioner's Exhibit No. 4)

Q. And that was after the Supreme Court had denied the certiorari, because it was out of time in the Ste. Marie case?

A. I don't remember the instances now in their order, but it seems to me that certiorari was denied in early October, and this contract, as I recall, was executed in November, and we filed our suit in December.

Q. Now, when you had this conversation that was shortly before the document dated November 20, 1940 was executed, where did you have it?

A. The first one at Palm Springs, and the second on the date when the contract was signed in Dave Sallee's office.

Q. With reference to the Palm Springs conference, where was that?

A. At his home, with Dave Sallee, Lee Arenas, and myself.

Q. And will you briefly outline the conversation?

A. I told Lee that I had examined all of the data that had been submitted to me and had rather exhaustively researched the law involved, and had also discussed the matter with John Steven McGroarty, who was active in behalf of the Indians, and had determined that I would be willing to accept association with Dave Sallee to bring the suit, and that it would be necessary for us to have some contract in writing with him, Lee Arenas, covering our employment. This was the conversation at Palm Springs, and I told him that it seemed to me that from the information I then had that ten per cent of the amount recovered would probably represent a fair compensation, and that if this met with his approval I would proceed with the preparation of a contract, and he then could come to Sallee's office at Los Angeles for its execution. Sub-

(Petitioner's Exhibit No. 4)

sequently, at Dave's office, I discussed with Lee Arenas and Dave the contract that had been prepared. I do not have any present recollection whether the contract was then signed in Dave's office or whether at a shortly later time it was signed at Palm Springs, but I do remember that I was present when Lee Arenas signed, and I asked him after having read it to him, if he was satisfied with it.

(Judge Preston: Do you think the contract was not signed in the court room?)

A. I am not sure. Frankly, I have in mind that I had drafted a writing that had been signed by Lee Arenas, but that is not the writing that was submitted to Judge McCormick. I was not present when the writing in the form as you have it was signed, because that was in Judge McCormick's office. My recollection is that after this first writing was signed by Lee Arenas, Dave stated that he had discussed the matter with Mr. Collett, and that Mr. Collett had suggested that Lee ought to be taken before a Federal Judge, and I told him I had no objection to that. It is my recollection, therefore, that the writing which was signed by Lee, as I have testified, was destroyed, a new writing was prepared, and that was taken by Dave and Mr. Collett to the Federal Court, but I was not present when that happened.

Q. Mr. Clark, having in mind the possibility, in view of your most recent statements, that the document dated November 20, 1940 is not the same document as you saw signed by Lee Arenas— A. I know it is not.

Q. Were the provisions substantially similar?

A. In substances, yes, but not as I recall all of the recitations about the regulations of the Indian Department and the Interior Department.

(Petitioner's Exhibit No. 4)

Q. Those were added?

A. Yes. The reason I make that statement is because I never had any confidence from the beginning that the Government or any department would ever approve any contract for the employment of any lawyer to file that case, and I told Dave that I wasn't interested in spending one minute of my time on it, but that I had no objection to Dave and Collett doing whatever they thought might be desirable to obtain such a consent, but that as fas as I was concerned I was going to base the recovery of my compensation upon my belief that in the circumstances of that case, in the event we won, the Court would find that we were entitled to a reasonable compensation for what we accomplished payable out of the property involved.

Q. Mr. Clark, you have several times mentioned a Mr. Collett, and so did Mr. Sallee. It is my recollection that in the various instruments which were offered in evidence in your second trial there were documents which bore the name of some Government official by the name of Collett. Is that the same man?

A. I don't think so. I met this man four or five times and had brief conversations with him, and the man I had in mind was not then a Government agent, he was interested in Indian affairs for a long time, as I was told.

Q. Following the date when you were informed, and you have now learned, that Mr. Arenas and Mr. Sallee appeared before Judge McCormick, were you informed of that fact and of the execution of the document?

A. Yes.

Q. Were you informed as to the contents as it had been redrawn? A. Yes, I saw it.

(Petitioner's Exhibit No. 4)

Q. And you then performed whatever services you did under arrangements that you made with Mr. Sallee under that agreement?

A. Until the subsequent agreement was agreed upon.

Q. That is between November 20, 1940 and February 1, 1945, you had no separate arrangement with Mr. Lee Arenas?

A. I never had any separate arrangement with Lee Arenas, but I did negotiate with him for a change in the basis of our compensation many months before the second writing was executed, and in fact at about the time Judge Preston came into the case.

Q. And that was at the time that the consultations were had which led up to the petition for certiorari in the Supreme Court? A. That's right.

Q. At that time you had one or more conversations with Lee Arenas?

A. You mean at the time the petition for certiorari was in prospect?

Q. It may be that the time was identical, but I had reference to your earlier statement that you had had a number of negotiations leading up to the second agreement prior to its execution.

A. Yes, and they began at the time when the preparation for certiorari was in prospect.

Q. In connection with those conversations, who were present?

A. Lee Arenas and myself on some of the occasions, and Dave Sallee on others.

Q. And where were they?

A. Some at Palm Springs at the home of Arenas, and others at Dave Sallee's office.

(Petitioner's Exhibit No. 4)

Q. Were any others present besides Lee Arenas, Dave Sallee, and yourself?

A. I have in mind, but indistinctly, that Mr. Arenas was there on one of the occasions when I went to Palm Springs alone. By that I mean without Dave. Then later and before the contracts were signed, Mrs. Arenas was with Lee in Dave's office, and I was there too.

Q. Just so there will be no question about it, Guadalupe was deceased, and the Mrs. Arenas you now refer to is the one who signed the document on February 1, 1945, Marian Therese Arenas? A. Yes.

Q. Will you briefly state the gist of these conversations leading up to the new agreement?

A. When it became necessary to petition the United States Supreme Court, I went to Palm Springs and talked with Lee. I told him that it would be necessary for me and Dave to go to Washington and be admitted to the Supreme Court before we could file a petition for certiorari, but that I felt, in view of the importance of the litigation and its then condition, that it would be very much to his advantage to employ another lawyer who had had experience in practice in the United States Supreme Court, and that I had spoken to Judge Preston, who had formerly served in the State Supreme Court on the bench and who had also served the Government in several important capacities, and that I had come to recommend to him that Judge Preston be employed in association with Dave and myself for the purpose of the petition to the United States Supreme Court and the conduct of the case thereafter if we won in that court. I told him that this would, of course, mean the payment of additional compensation to the lawyers, and that I had not discussed with Judge Preston what his fee would be, but if the plan

(Petitioner's Exhibit No. 4)

met with Lee's approval I would do that and talk with him further. Lee told me that he would be very glad for that to be done and for me to go ahead. I then returned to Los Angeles and presented the matter in detail to Judge Preston, and as I recall, a period of at least two weeks elapsed, because Judge Preston was rather reluctant to engage in the litigation, but I continued to press the matter. He made a trip to the North and upon his return called me and said that he would be willing to be associated in the case. I then contacted Lee Arenas. It is my impression that Dave had called him to Dave's office and that Dave was present on this occasion. At the time I made this report I told Lee that Judge Preston had agreed to the association and that it would be necessary to prepare an additional contract covering our compensation, but that we were so busy in doing the things that had to be done in the case because we were working under a time limit, that I would not undertake to prepare that contract until other things had been attended to, but that when I did prepare the contract it would be upon the basis of a reasonable fee for the work done, having in mind what should be accomplished in event we won it, and the fee to be fixed by the United States District Court here, and I explained that to him in detail as to how it was fair, I thought, to us and fair to him, so that the Court knew exactly what the picture was and the Court then could say what was a reasonable fee to us and what was reasonable for Lee to pay. He told me it was perfectly fair and to go ahead and let him know when I wanted the new contract signed. The matter went on for a long time before I got around to the drafting of the contract with Dave, and then it eventuated into the signing of the later and last contract. When that contract was signed I read

(Petitioner's Exhibit No. 4)

it to Lee and explained it to him, reminded him of the conversation that we had had before in reference to it, and Lee in substance said it was acceptable to him, and it was signed.

Q. When you contacted Judge Preston did you relate to Judge Preston, in substance, the representations and statements that you had made to Mr. Arenas, such as you have just stated?

A. I did relate to Judge Preston what I had said to

I [Mathes, J.]

Lee, and ~~Lee said he~~ had contacted Judge Preston before I suggested him to Lee.

Q. Before Judge Preston accepted employment you related to him, in substance, the statements you have just related? A. I did.

Q. Did you also disclose to Judge Preston the text of the agreement of November 20, 1940?

A. My recollection is that I brought a copy to Judge Preston's office.

Q. And left it with him, before Judge Preston entered into the employment of the case? A. Yes.

Q. At the time you commenced these conversations with Mr. Arenas looking toward a modification of the agreement of November 20, 1940, had you helped perform any legal services as counsel for Mr. Arenas in this case?

A. Yes. I had begun the suit and carried it through the Circuit Court and to the point where the petition for certiorari was required to be filed before I discussed with Lee the modification of the original contract.

(Petitioner's Exhibit No. 4)

Q. Did you suggest to Lee Arenas that he obtain or seek or get the advice of any independent counsel before he modify the agreement?

A. No, I did not. I did suggest to him that he discuss the matter with the local Indian agent, whose name I now forget, at Palm Springs.

Q. Mr. Veith? V-E-I-T-H?

A. Yes, I believe that is the name. I had met him and heard of him and had every confidence in him, esteemed him very highly, and knew he was a friend of the Indians, and I asked Lee to talk to him about the advisability of doing the thing I had suggested.

Q. You knew Mr. Veith was not a lawyer, or did you believe at the time that he was?

A. No. That never occurred to me. I was thinking of him as a friend of the Indians and a man of such responsibility that the Government had made him the local Indian agent.

Q. Mr. Clark, so far as your knowledge serves you, do you know whether or not Mr. Lee Arenas obtained or sought any independent advice before he accepted your suggestions and signed the agreement of February 1, 1945?

A. That question calls for hearsay, but I can say this as to what I understood. I understood from John Steven McGroarty that he and some woman active in behalf of the Indians, had discussed with Lee Arenas and other Indians at the town of Palm Springs the possibility of doing the very thing that I suggested, namely, bring-

Judge Preston, and Mr. McGroarty [Mathes, J.]

ing in ~~John Steven McGroarty,~~ between the time I first spoke to Judge Preston and the time when Lee Arenas finally told me to go ahead, called me to him home one

(Petitioner's Exhibit No. 4)

evening and said to me that he thought the idea was one of the most brilliant things that had been suggested in the course of the litigation, and that he had talked with this woman, whose name I don't remember, but I can get it, and that Lee was satisfied and he knew that this was what was going to be done. I do remember at a later time I talked with Mr. Berry, the local agent, about it, and he congratulated me upon the fact that I had thought of doing it, and had been able to do it, namely, to get Judge Preston into the case.

Q. Did you tell Mr. Arenas, as a part of your conversation leading up to the signing of the documents dated February 1, 1945, that it was necessary for him to sign an agreement of that kind before further proceedings could be had in his case?

A. No. Our relations were such that if Lee Arenas told me to go ahead on the basis of our oral understanding, it was just as good as if it was in writing, and the fact that that contract wasn't signed until after we had gone through the United States Supreme Court and had come back here for the trial of the case—

Q. Did you tell Mr. Lee Arenas in any of the conversations following the effective date of November 20, 1940 and prior to February 1, 1945, that you could go no further with his case after the Circuit Court of Appeals had affirmed the summary judgment unless he would execute an agreement covering a larger fee? A. No.

Q. What did you tell him in that respect?

A. I told him I thought it was advisable that Judge Preston be associated in the case, but that if he did not agree to it I would go to Washington and become admitted to the Supreme Court and file the petition while I was

(Petitioner's Exhibit No. 4)

there, because I at all times had in mind that if Judge Preston would not become associated I would go ahead with the litigation through the Supreme Court.

Q. Did you contemplate that if you had gone through with the litigation to the Supreme Court and had obtained a reversal of the Circuit Court opinion that you would conduct further proceedings in whatever courts might be required until the trust patent was obtained?

A. I did. In other words, I assume you want to know if I at any time suggested to Arenas that if I and Dave would go ahead without any additional lawyer, we would expect any compensation in addition to what our original contract provided for. No, I never had that in mind. I never suggested it to Arenas and the only reason the new contract for compensation was made was because of the additional services that we were able to obtain from Judge Preston being in the case.

Q. Did you personally receive any monies in the way of fees, either directly or indirectly, from Lee Arenas for costs and expenses in the case?

A. Only through Dave Sallee, and not then to the extent of what expenses I incurred.

Q. Do you keep books of account on your cases?

A. Not on that case. My fee was entirely contingent. The only expenses I received was when we went back to Washington to argue the case in the Supreme Court. Dave gave me the money for that, and then again when we went to San Francisco to argue the matter in the Cir-

(Petitioner's Exhibit No. 4)

cuit Court on the Government's Appeal he gave me the expense money for that.

Q. You refer to Judge Preston and yourself?

A. Yes. Otherwise Dave handled the payment of expenses, not I.

Q. You don't know, then, from what source the money came?

A. No, excepting as Dave told me, and the Indians told me contributions were made in part by Lee Arenas and his wife, and in part by some of the other Indians.

Q. Did you ever present either the agreement of November 20, 1940 or the agreement, or either of them, of February 1, 1945, or any other writings which were directed to, and the contents of which evidenced some form of negotiations or agreement for your employment as counsel with Lee Arenas, to any representative of the Federal Government? A. No.

Q. You never obtained any approval?

A. None whatever.

Q. Aside from the document dated February 20, 1940 and the two documents dated February 1, 1945, were there any writings which you know of which were executed by Lee Arenas and which you purport to have acted under as employment contracts?

A. None except the first, which was only effective at most for a few days and torn up, and superseded by the one presented to Judge McCormick.

(Petitioner's Exhibit No. 4)

Q. And that was done with Mr. Arenas' consent?

A. Yes.

Q. Did you have any personal written communications in connection with either of these agreements or contracts or in connection with your employment or activities in behalf of Lee Arenas, with any representative of the Federal Government? A. None whatever.

Q. Have you ever submitted a statement, account, or any other form, of rendering of a voucher or claim, for your services in this case to any representative of the Federal Government aside from the joining in the petition?

A. No.

Q. Have you ever received, either orally or in writing, any communication from any representative of the Federal Government which either expressly or impliedly informed you not to make any such application or to render any such statement? A. No.

Q. Were you present when Mr. and Mrs. Arenas signed the documents dated February 1, 1945?

A. Yes.

Q. Where did they sign them?

A. In Dave Sallee's office.

Q. Were both of them present at the time they were signed—did they sign in each other's presence?

A. Yes.

(Petitioner's Exhibit No. 4)

Q. Was Mr. Benton Beckley present?

A. My recollection is that he was. He seems to me to be the one who came to my office and said Lee Arenas and his wife are down there waiting for me.

Q. Do you know definitely the date on which they signed was February 1, 1945?

A. No, I have absolutely no recollection of that.

Q. Did you see any formal acknowledgement of their signature before the notary?

A. I have absolutely no recollection of that.

Q. Did you have knowledge, either by communication from Mr. Sallee orally, or by being disclosed to you through the writings, that the document dated November 20, 1940, had been submitted to the Office of Indian Affairs? A. Yes, I did.

Q. And were you likewise informed that at some date, not definitely fixed here but approximately in 1942, the United States, through the Office of Indian Affairs, had refused or declined to approve the contract?

A. I was told by Dave Sallee and shown the letter that they had refused to take action upon them, and had returned the contracts.

Q. Did you communicate with Judge Preston?

A. I don't remember.

Q. I think that's all, Mr. Clark.

OLIVER O. CLARK

(Petitioner's Exhibit No. 4)

INTERROGATION BY MR. BRETT OF MR. JOHN W. PRESTON

Q. As I understand it, the first time you came into the matter was when your services were solicited by Mr. Clark? A. That's right.

Q. And that at that particular time did you meet Lee Arenas, or was it at a later period?

A. Much later I think.

Q. You have heard Mr. Clark's statements that have just been made? A. Yes I have.

Q. Would you add to or change any of those statements?

A. I have nothing to add. Some I recall, and some I don't.

Q. We made provision here that if there are to be any corrections, they will be made, and if—

A. The Statement of Facts that I have delivered to you contains a recitation in brief of my activities in the case, giving days and dates, etc. I started in September 1943.

Q. At the time that you started in that employment in 1943, you were informed of the provisions of the document dated November 20, 1940?

A. Well, I have a reasonably good memory that I knew something about it—that they had a contract, and for ten per cent, and that I didn't think it was enough, I remember that.

Q. Do you recall whether you personally told Lee Arenas that you didn't think it was enough before you started in on your employment?

A. I didn't do that.

(Petitioner's Exhibit No. 4)

Q. I have in mind the document dated February 1, 1945 was after you had performed substantial portions of your services?

A. You are right. I don't think I had any personal talk with Lee Arenas or that I informed him of anything.

Q. Whatever information he had came through others?

A. Yes; that's right.

Q. You were not present when the documents dated February 1, 1945 were signed? A. I was not.

(Mr. Brett: Mr. Clark, who prepared the documents dated November 20, 1940, the ultimate documents?

Mr. Clark: I think I did.

Mr. Brett: The one presented to Judge McCormick?

Mr. Clark: No, I think some changes were made by Dave and then a Mr. Collett, after the signing of the one we had prepared.

Mr. Brett: You don't know, definitely, Mr. Clark, of your own knowledge, who prepared the document dated November 20, 1940?

Mr. Clark: In the form as signed by Judge McCormick, no.

Mr. Brett: Mr. Clark, who prepared the documents which are identical except as to the names of the clients, the documents dated February 1, 1945?

Mr. Clark: I did.)

Q. Now, Judge Preston, did you ever, either orally or in writing, submit either of these contracts or agreements dated November 20, 1940 or February 1, 1945, respectively, to any representative of the Federal Government? A. I did not.

(Petitioner's Exhibit No. 4)

Q. Did you orally, or in writing, submit any statement, voucher, or other form of claim, to any representative of the Federal Government? As a claim for either repayment of expenses or payment of fees?

A. I have made no claim to the Government asking either for expenses or for compensation.

Q. Is there any written document existent of which you have knowledge and in which you participated as a party or under which you claimed to have been employed and to have performed services for Lee Arenas, other than the document dated November 20, 1940 and the two documents dated February 1, 1945?

A. I know of none other.

Q. You have submitted to me, I take it in view of what you have said, a two-page communication dated January 2, 1948, which is headed "Statement of Account, etc." and which contains a number of entries indicating dates, the general character of the expenditures or receipts, in two columns, the lefthand of which apparently is a matter of receipts, and the righthand a matter of disbursements—is that an accurate statement and record of your book account?

A. It is supposed to be a correct transcript of my records.

Q. Does it constitute all of the monies received and expended by you in connection with this particular litigation? A. Yes.

Q. And from whom did you receive the various receipts?

A. The amounts I received were usually, and I think almost entirely, from Mr. Sallee direct, with the possible exception of one item. I think the item dated June 15,

(Petitioner's Exhibit No. 4)

1946, for printing brief on appeal, $86.20, was paid to me direct by Mrs. Arenas when she appeared in this office [J.W.P.]
~~decision~~, accompanied by three or four other Indians, and I gathered the impression that the other Indians had contributed certain portions of that sum. Other than that, all receipts were from Mr. Sallee, as I recall it.

Q. Incidentally, I note that I inadvertently erred in describing the document. Your disbursements appear in the lefthand column, and your receipts in the righthand. You referred to the item of June 17 rather than June 14—the printing of the brief on appeal?

A. That's right.

Q. And without going into further detail, each and every item as set forth as an expenditure is the actual amount you spent in connection with this case?

A. Yes.

Q. And was necessary in the performance of your duties in prosecuting the case? A. Yes.

Q. May it be stipulated that a copy of this statement may be made an exhibit?

A. Yes, exhibit to my statement.

Q. Had you ever suggested to Mr. Arenas, Judge Preston, that he seek independent advice before he modified his contract of November 20, 1940 and prior to the time when he signed the documents dated February 1, 1945?

A. I had no direct communication with Mr. Arenas on that.

(Petitioner's Exhibit No. 4)

Q. You had talked to him on other matters in the case, because you tried the case before that date, didn't you?

A. I was at Mr. Arenas' house in Palm Springs once, and I examined Mr. Arenas as a witness at the time of the trial. I had a few talks with him in the corridor of the court room, and I don't remember ever talking to him any other time.

Q. I assume you talked to him before you put him on the stand?

A. That's my custom to talk to a witness first, but I swear I don't remember talking to him.

Q. I wasn't present at the trial. Judge Preston, you have had broad experience both on the bench and as an attorney—now, having in mind Mr. Sallee's previous statements and Mr. Clark's previous statements as to what they told Mr. Arenas, is it your opinion that Mr. Arenas was sufficiently informed of English and sufficiently educated to understand and comprehend the information and advice which he was being given?

A. I certainly think he was competent at that time to transact business—as competent as the ordinary individual of the White Race. He showed on the witness stand intelligence that was very noticeable—he was commended by the Judge as being an intelligent witness—and if you will recall, the contract is simply a quantum meruit to be fixed by the court. It doesn't require a great deal of advice to make such a contract, and I think also it is valid under the law.

(Petitioner's Exhibit No. 4)

Q. Did you ever, at any time, discuss with Mr. Arenas, in connection with either of these documents, the one dated November 20, 1940, and the one dated February 1, 1945, the references therein made to the documents being subject to actions by the Federal Government through the Department of the Interior or Office of Indian Affairs?

A. No, not on either of them, at any time.

Q. These are the only two agreements you are relying on? A. Yes.

Q. And you had no written communications with any Government official in connection with either your employment or the payment of your fees or any of the details in connection with your services?

A. I very early got hold of the Barnett decision, and my course of conduct was guided by that decision.

Q. That's all, Judge. Thank you.

JOHN W. PRESTON

Case No. 1321 O'C. Arenas vs. U. S. Petr's Exhibit No. 4. Date 2/10/48. No. 4 in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[Endorsed]: Filed Feb. 10, 1948. Edmund L. Smith, Clerk.

[PETITIONER'S EXHIBIT NO. 4A]

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In the District Court of the United States, Southern District of California, Central Division.

Lee Arenas, Plaintiff, vs. United States of America, Defendant. No. 1321 O'C—Civil.

STATEMENT OF FACTS

Preliminary Work

Petitioners Clark and Sallee did the preliminary work looking to filing of the Complaint and in fact handled the litigation from July 1940 until September 1943. Prior to the filing of the action and during the months of July, August, September and October, 1940, these counsels spent approximately 40 days in the study of the voluminous records and other data available, including, of course, the legal questions involved in the contemplated suit. At least 4 trips were made to Palm Springs in connection with the matter and 3 visits to the bedside of Mr. Sloan, an attorney who had handled much Indian litigation and was the leading counsel in the so-called St. Marie case. During this period the following events had occurred: About July 1938 eighteen of these Palm Springs Indians, a majority of the twenty-four Indians who had received

(Petitioner's Exhibit No. 4A)

allotments under the 1927 proceedings, began an action in this Court entitled, "St. Marie et al vs. United States," which had for its object the identical relief Lee Arenas has secured in the present action. On the 23rd day of July, 1938 this Court, the Honorable Leon R. Yankwich presiding, denied in toto the claims of these eighteen Indians (24 Sup. 237). An appeal was taken to the Circuit Court of Appeals, Ninth Circuit, where on the third day of January, 1940 this judgment was affirmed (108 Fed. 2d 876). Certiorari was sought from the Supreme Court. This was denied on October 4, 1940. This Petition, however, did not settle the legal questions, because it was denied on the ground that it had been filed one day too late. This was the situation that confronted counsel for Lee Arenas on December 24, 1940 when this action was begun. The United States was a determined adversary during the pendency of the St. Marie case and continued to be such throughout the pendency of this cause, and still is a determined and persistent adversary.

Chronology of the Present Action

This action was instituted by Lee Arenas on the 24th day of December, 1940. The United States was made defendant pursuant to the Act of August 15, 1894 (25 U. S. C. A. Sec. 345), which said statute authorized any person of Indian blood who claimed an allotment under any Act of Congress to have the validity of his claim declared by a judgment of the District Court.

The Agua Caliente or Palm Springs Band of Mission Indians claimed their rights to allotments by virtue of the acts and proceedings taken by a duly appointed Alloting Agent, who first made a series of allotments to each

(Petitioner's Exhibit No. 4A)

Indian of the Tribe on June 21, 1923, and later made a reallotment to a part of them only on May 9, 1927.

This action was taken pursuant to the provisions of the Act of June 12, 1891, (26 Stat. 712-14) amended by the Act of June 25, 1910, (36 Stat. 855-863) and the Act of March 2, 1917 (39 Stat. 976). The 1923 allotment proceedings included all of the Band of fifty Indians. These proceedings were nullified because allotments were not made at the special instance and request of the individual Indians.

The proceedings in 1927 were taken pursuant to the written request of twenty-four Indians of the said Tribe. Lee Arenas and Guadaloupe Arenas, his wife, were included in both the 1923 and the 1927 allotment proceedings. Francisco Arenas, father of Lee Arenas, died October 4, 1924, and Lee's brother Simon, died February 18, 1925. The deceased Indians were named in both the 1923 and the 1927 allotment proceedings. Because of their death prior to May 9, 1927, their allotments were adjudged invalid. Guadaloupe Arenas was also dead at the time this action was begun, but she was alive on May 9, 1927.

Perilous Course of the Present Cause

The action was instituted December 24, 1940. A first and second amended complaint was filed in the action in the year 1941, the latter being a document of seventy-two paragraphs, forty-eight printed pages, filed October 27, 1941. Motions to dismiss or, in the alternative (two in number) summary judgments were made by the United States supported by two affidavits and a certificate of the acting Commissioner of Indian Affairs. The motions

(Petitioner's Exhibit No. 4A)

were heard on the 26th day of January, 1942, and Summary judgment was granted on March 6, 1942.

In preparation of the three complaints and the resisting of these motions Messrs. Clark and Sallee performed much research and made many court appearances. The time spent by these two counsel is estimated at four days in Court and five days in office research and preparation of documents.

On June 3, 1942 an appeal taken from the summary judgment entered on March 6, 1942, on which a record was prepared consisting of 69 pages, became action No. 10219 of the records of the Circuit Court of Appeals, Ninth Circuit.

An Opening Brief of 45 pages with an appendix of 6 pages was prepared and filed on December 16, 1942. The United States responded with a brief consisting solely of a reliance upon decision in the St. Marie cases above referred to (supra p. 2) Appellant replied with a brief of 7 pages.

The cause was orally argued March 8, 1942. The judgment of the Court below was affirmed by opinion and judgment filed June 30, 1943. (See 137 F. 2d 199.) Appellant duly filed on July 23, 1943 his Petition for a rehearing consisting of 3 pages which Petition was denied on August 4, 1943. Messrs. Clark and Sallee consumed approximately 10 days in office preparation of the appeal and one day in oral argument before the Circuit Court of Appeals.

On September 7, 1943 John W. Preston became one of the counsel of record for Lee Arenas. A transcript of record was then prepared to accompany a petition to the

(Petitioner's Exhibit No. 4A)

Supreme Court for certiorari, consisting of 78 pages. The whole subject of allotments was then reexamined in the office of John W. Preston, both by him and other members of his staff, during which approximately 15 days were spent in research. The result of said labor was the Petition for Certiorari which was filed October 29, 1943. This document, including a short appendix, covered 23 pages. The United States filed a brief of 9 pages in opposition to this Petition. The Petition was granted on the 20th day of December, 1943 by the Supreme Court. On February 25, 1944, counsel for Arenas prepared and filed a supplemental brief consisting of 25 pages, which was a careful examination of the statutes and decisions upon the subject of Indian allotments.

In the preparation of the Petition for Certiorari and the Supplemental Brief, John W. Preston and the members of his staff consumed approximately 15 days.

On March the 6th and 7th, 1944 Messrs. Preston and Clark attended a hearing of the cause before the Supreme Court in Washington, D. C., and on said days argued said cause before said Court. They also spent one day in searching records in the General Land Office and in the office of the Solicitor of the Department of the Interior.

On May 22, 1944, the Supreme Court of the United States rendered its opinion and judgment reversing the judgment below and remanded the cause for a trial on merits (322 U. S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363).

(Petitioner's Exhibit No. 4A)

On the 27th day of June, 1944, Mandate duly issued to the District Court of the United States for the Southern District of California and it was spread on the records of said District Court on the 12th day of September 1944. During the period from September 1943 to September 1944, Petitioners Clark and Sallee estimated their time at legal work, including travel time to Washington, D. C. and Palm Springs at approximately 50 days.

Thereupon, Petitioners prepared a Third Amended Complaint in the action to conform to the rulings of the Supreme Court. The same was duly filed on the 9th day of January, 1945, and consisted of 22 printed pages and four causes of action. On the 15th day of January, 1945, the United States filed its Answer to said complaint which consisted of three defenses to each count of the complaint and covered 16 printed pages.

In a restudy of the cause following the reversal of the judgment and in the preparation of the Third Amended Complaint all counsel utilized approximately 20 days of office work.

Elaborate preparation for trial of the cause preceded January 9, 1945. This preparation included further examination of the law and the securing of witnesses particularly the last witness, Harry E. Wadsworth, the Alloting Agent then a man of more than eighty years of age.

(Petitioner's Exhibit No. 4A)

On January 9, 1945, the trial Judge made an order on pretrial and a supplemental order on January 15, 1945. Under these pre-trial orders counsel for the respective parties spent approximately five days in the consideration of matters that could be stipulated to. 27 different items of fact and exhibits that could be introduced in evidence were stipulated and on January 15, 1945 we represented to the Court that further stipulations would be made and the supplemental order resulted.

Under the supplemental order the parties agreed upon some 30 additional items and reported same to the Court on January 30, 1945.

The cause was tried in 2 days, January 30th and 31st, 1945.

In addition to the matter admitted in evidence under the pre-trial orders, there was received 49 exhibits styled Court exhibits and exhibits "A" to "F", inclusive, were accepted for the defendant. The exhibit styled "F" was a document containing a discussion of the Mission Indian problems from 1891 to date and it had as a sub-exhibit, 107 pieces of writing. This exhibit contains 300 pages of the record, Vol. 2, pp. 300 to 603. Only four witnesses gave oral testimony. When the evidence was concluded the trial judge made the following observation:

> "I will make first some remarks. I am inclined to say I have never had a better presented case from the standpoint of the facts, particularly, because you at-

(Petitioner's Exhibit No. 4A)

torneys on both sides very sensibly got together and agreed on these exhibits, which has saved the Court a great deal of time. Very commendable. It shows the efficacy of the pre-trial, of which there was some little hesitancy about receiving on the part of the older practitioners, and I might say myself, a hesitancy to accept any innovations in trial work when we have been long years accustomed to one procedure. I think counsel on both sides will see that it had worked out very well in this case."

Proposed findings of fact and conclusions of law and judgment were prepared by petitioners and over 35 printed pages in the record. They were accepted by the trial court as drafted and without change. This work consumed approximately 5 days.

The United States on the 9th day of June, 1945, lodged with the Court a written motion to vacate the judgment, also the conclusions of law and to amend in numerous particulars the findings of fact and conclusions of law.

The motion was resisted by petitioners who made an oral argument against the motion. The Court submitted the motion on June 11, 1945, and denied the same by order made on July 10, 1945.

Thereafter, and on the 8th day of August, 1945, the United States filed its Notice of Appeal from the whole of the Judgment. A transcript consisting of 608 printed pages was prepared by Counsel for the United States, with

(Petitioner's Exhibit No. 4A)

the aid of petitioners. Elaborate briefs were prepared and filed by both appellant and appellee. Appellee's Reply Brief consisted of 39 printed pages.

The cause came on for hearing in the Circuit Court of Appeals at San Francisco on the 27th day of August, 1946, when two counsel for Appellee appeared and argued the cause.

On December 12, 1946, the Circuit Court of Appeals affirmed the judgment in part and reversed it in part. The net result was that plaintiff's right to the allotments selected by him and his wife, Guadaloupe Arenas, were validated and the claims for the allotments in the name of Francisco Arenas and Simon Arenas were declared invalid.

Appellee, being dissatisfied with the decision respecting the allotments claimed in the name of Francisco Arenas and Simon Arenas, prepared and on January 12, 1947 filed a Petition for Rehearing. The same was denied January 14, 1947.

Petitioners thereupon prepared a record as the basis for an application for Certiorari to the Supreme Court of the United States, which consisted of 676 printed pages. A Petition for Certiorari, consisting of 32 printed pages was prepared and filed within the time allowed by law. But the Supreme Court denied the same by order dated June 9, 1947. During the period from January 9, 1945, until the conclusion of the case, Oliver O. Clark estimates his time at 27½ days. David D. Sallee estimates his

(Petitioner's Exhibit No. 4A)

time at 10 days. John W. Preston estimates his time at 40 days. This period covers the second trial of the action, the defending of the judgment in the Circuit Court of Appeals and the preparation of the Petition for Certiorari to the Supreme Court of the United States. The Judgment in said cause contained the following provision:

> "The Court hereby retains jurisdiction over this action and the subject matter thereof for the purpose of adjudicating the reasonable sums that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in the action and for expenses necessarily incurred by them in his behalf in the prosecution thereof, and for the purpose of making all necessary and proper orders, judgments and decrees for the securing and payment of all such sums so found due and owing by the plaintiff to said attorneys."

The litigation having terminated the petitioners filed with the Trial Court their Petition for a Supplemental Decree fixing attorneys' fees and for means of collecting same.

The value of the lands recovered for Lee Arenas is considerably in excess of One Million Dollars ($1,000,000.00).

Case No. 1321 O'C. Arenas vs. U. S. Petr's Exhibit 4A. Date 2/10/48. 4A in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[PETITIONER'S EXHIBIT NO. 6]

AGREEMENT

This Agreement made and entered into this 20th day of November, 1940, by and between Lee Arenas, a duly enrolled member of the Tribe of Indians known as the Agua Caliente (Palm Springs) Band of Mission Indians of California, Party of the First Part, and David D. Sallee, attorney at law, residing at Los Angeles, California, Party of the Second Part,

Witnesseth:

That the Party of the First Part hereby contracts with, retains and employs the Party of the Second Part as attorney in the matters hereinafter mentioned, subject to the approval of the Commissioner of Indian Affairs, and the Secretary of the Interior, pursuant to Section 2103 of the Revised Statutes of the United States of America.

It shall be the duty of said attorney to advise and represent the said Lee Arenas in connection with property investigating and formulating any claim, or claims, either in law or in equity, that he may have by virtue of being a member of said Tribe as aforesaid, and by reason of the fact that he by inheritance has certain claims to certain properties hereinafter set forth, by virtue of the so-called Allotment Act of the Agua Caliente Band of Mission Indians residing in or about the vicinity of Palm Springs, in the County of Riverside, in the State of California, and in the United States of America, which said Act is known and designated as the Act of Congress of February 8, 1887 (24 Stat. L. 388) as amended by the Act of June 25, 1910 (36 Stat. L. 855), and Supplemented by the Act of March 2nd, 1917 (39 Stat. L. 969-76) which said Act provided among other things for the selec-

(Petitioner's Exhibit No. 6)

tion of allotments to Indians of the United States of America, and especially pertaining to the allotment selections of the said Agua Caliente (Palm Springs) Indian Reservation Tribe of Indians in California; and that said allotments or selections are hereinafter set forth, as follows to-wit:

Lot No. 46, Section 14, Twp. 4 S., Range 4 East, S. B. B. & M., Riverside County, State of California, containing two (2) acres;

Tract No. 39, Section 26, Twp. 4 South, Range 4 East, S. B. B. & M., Riverside County, State of California, containing five (5) acres;

The East ½ of SW¼ of NW¼ and SE¼ of NW¼ of NW¼ and SW¼ of NE¼ of NW¼, Section 26, Twp. 4 South, Range 4 East, S. B. B. & M., Riverside County, State of California, containing forty (40) acres;

Lot 28, Sec. 14, Twp. 4 S., Range 4 E., S. B. B. & M., Riverside County, State of California, containing two (2) acres;

Tract No. 42, Sec. 26, Twp. 4 South, Range 4 E., S. B. B. & M., Riverside County, State of California, containing five (5) acres;

SW¼ of SW¼, Sec. 26, Twp. 4 South, Range 4 East, S. B. B. & M., Riverside County, State of California, containing forty (40) acres;

Lot 47, Sec. 14, Twp. 4 South, Range 4 E., S. B. B. & M., Riverside County, State of California, containing two (2) acres;

(Petitioner's Exhibit No. 6)

Tract No. 40, Sec. 26, Twp. 4 S., Range 4 E., S. B. B. & M., Riverside County, State of California, containing five (5) acres;

SE¼ of NW¼, Sec. 26, Twp. 4 South, Range 4 East, S. B. B. & M., Riverside County, State of California, containing forty (40) acres;

Lot 43, Sec. 14, Twp. 4 South, Range 4 East, S. B. B. & M., Riverside County, State of California, containing two (2) acres;

Tract 37, Sec. 2, Twp. 5 South, Range 4 E., S. B. B. & M., Riverside County, State of California, containing five (5) acres;

SE¼ of SW¼, Sec. 26, Twp. 4 S., Range 4 E., S. B. B. & M., Riverside County, State of California, containing forty (40) acres,

which said allotments were certified on or about the 21st day of June, 1923, by H. L. Wadsworth, Special Allotting Agent.

It shall be the duty of said attorney to advise the said Party of the First Part, and to represent him before all courts, departments, tribunals, and other officers and commissions having any duty to perform in connection with the investigation, consideration, or final settlement of his said claims, and any and all matters that may be necessary in the opinion of the said attorney at law, Party of the Second Part, and in the final settlement of any and all claims and matters pertaining to said allotment to said Party of the First Part, or to any of the ancestors of the said Party of the First Part, and any relative either by law or by marriage that might become the property of

(Petitioner's Exhibit No. 6)

the said Party of the First Part by inheritance, or otherwise.

That said Party of the Second Part, attorney at law as aforesaid, in the performance of his duties as required of him under this contract, shall be subject to the reasonable supervision and direction of the Commissioner of Indian Affairs, and the Secretary of the Interior, and the said attorney at law shall not make any compromise, settlement or other adjustment of the matters in controversy unless with the approval of either or both of said officers; and it is also understood and agreed that the said attorney at law, and his associates if any, shall pursue the litigation in question to and through the Court of final resort, unless authorized by the Secretary of the Interior to terminate the proceedings at an intermediate stage thereof;

It Is Agreed that the said attorney is hereby authorized to associate with him in said work hereunder such assistants, including attorneys, as he may select, provided that the Government of the United States shall not be liable for any expenses; however, it is understood and agreed by the said Party of the First Part that he is to advance from time to time to said attorney such reasonable and necessary expenses which said Party of the Second Part, or his associates, may deem necessary for the proper conduct of any litigation or appearances before any Commission or body of the United States to further said litigation or compromise thereof for the benefit of the said Party of the First Part, which said expenses which may be advanced are to be borne by the said Party of the First Part; however, the Party of the Second Part is to furnish proper vouchers for each and every item of expense that may be incurred.

(Petitioner's Exhibit No. 6)

It Is Further Understood that in consideration of the services to be rendered under the terms of this contract, the Party of the Second Part shall receive an aggregate fee of ten per centum (10%) of the amount of the reasonable value of the property hereinabove set forth, or such part thereof as the Party of the First Part may become entitled to by reason of said litigation or proceedings. Said ten per centum compensation shall be upon the basis of the reasonable market value of the said property as of the date of the completion of said litigation, but in no event shall be less than the value as of the date of the signing of this agreement.

It Is Further Understood that in event the Party of the Second Part, or his associates who are actually associated in the litigation and investigation as aforesaid, shall advance any necessary expenses, they shall be reimbursed by the Party of the First Part, from the property recovered, such actual expenses as are strictly necessary or proper in connection with the printing of briefs, court costs for proceedings and other similar matters, and to include such actual and necessary traveling expenses, clerical hire, stenographic expense, and the like as may be properly required for the prosecution of said case, or cases; provided that all such expenditures shall be itemized and verified by the Party of the Second Part, and shall be accompanied by proper vouchers, and shall be paid only upon the approval of the Secretary of the Interior, or an officer designated by him who shall certify the same.

(Petitioner's Exhibit No. 6)

It Is Further Understood and Agreed by and between the parties to this Agreement, that in event of a misunderstanding as regards the manner in which the compensation to the Party of the Second Part from the Party of the First Part shall be paid; and Trust Patents or receipts have been issued, and in that event the Party of the First Part shall thereupon make application for a removal of restrictions upon sufficient of the premises to be sold, and from the proceeds of said sale or sales to pay said Party of the Second Part; that in event it is not for the best interests of the parties hereto to sell said land, the removal of restrictions shall be applied for upon properties coming to the First Party, as selected by said Second Party, upon the basis of one-tenth of the property—that is to say, Second Party shall select one property that does not exceed ten per cent. of the total value of all properties, and that First Party shall select nine properties that do not exceed ninety per cent. of the total value of said properties, and continue to make such selections until all property shall have been selected. That the property selected by the Second Party shall then be deeded to said Second Party, subject to the approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

It Is Further Agreed that this contract shall continue for a period of five (5) years beginning with the date of the signing thereof, or until the completion of said litigation.

(Petitioner's Exhibit No. 6)

And it is further understood and agreed that no assignment of this contract, or any interest therein, shall be made without the consent previously obtained from the Commissioner of Indian Affairs, and the Secretary of the Interior, and that such assignment if made must comply with Section 2106 of the Revised Statutes of the United States.

This contract shall run to and be binding upon the heirs, executors, administrators, and assigns of the parties hereto.

In Witness Whereof we have hereunto set our hands and seals this 20th day of November, 1940, in the City of Los Angeles, State of California.

Lee Arenas
Lee Arenas
Party of the First Part

David D. Sallee
David D. Sallee, Atty.
Party of the Second Part.

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

.....,19 .

The foregoing contract is hereby approved in accordance with the provisions of section 2103 of the United States Revised Statutes.

.....
Commissioner

(Petitioner's Exhibit No. 6)

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

.....,19 .

The foregoing contract is hereby approved in accordance with the provisions of Section 2103 of the United States Revised Statutes.

.....

Secretary

I, Paul J. McCormick, a Judge of the District Court for the Southern District of California, a Court of Record, do hereby certify, pursuant to Section 2103 of the Revised Statutes of the United States, that David D. Sallee, Attorney at law, of Los Angeles, California, Party of the second part to the above written and hereto attached contract, in his own proper person and in my presence at Los Angeles, on the 20th day of November, 1940, entered into, signed and executed in quadruplicate the said contract above written and hereto attached, and that he executed the same in his own behalf and of his own free act and deed; and that as then stated to me that said Lee Arenas of the Agua Caliente Tribe of Indians is the party interested on the one side, and that the said attorney at law of Los Angeles is the party interested on the other.

In Witness Whereof, I have hereunto signed my name as Judge of the said Court.

(Seal) Paul J. McCormick
(Judge)

(Petitioner's Exhibit No. 6)

District Court of the
Southern District
of the State of California—ss.

I, R. S. Zimmerman, Clerk of the Court in said District, do hereby certify that Hon. Paul J. McCormick, whose genuine signature is subscribed to the annexed writing, was, at the time of signing the same, Judge of said Court, duly commissioned and qualified.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Court at the City of Los Angeles, on the 20 day of November, 1940.

(Seal of the District Court).

(Seal) R. S. Zimmerman
Clerk of the District Court for the Southern District of the State of California.

I, Paul J. McCormick, the Judge of the U. S. District Court for the Southern District of California, Central Division, a Court of Record, pursuant to Section 2103 of the Revised Statutes of the United States, do hereby certify that Lee Arenas, in his own proper person, and in my presence, at Los Angeles, in the State of California, on the 20th day of November, 1940, entered into, signed and executed in quadruplicate, for and in behalf of himself (an Indian of the Agua Caliente Band of Mission Indians) the contract above written and attached hereto; that, as then stated to me, the said Lee Arenas is the party interested on the one side, and the attorney, David D. Sallee, on the other.

In Witness Whereof, I have hereunto signed my name as Judge of the said Court.

(Seal) Paul J. McCormick
(Judge)

(Petitioner's Exhibit No. 6)

District Court for the
Southern District of
the State of California—ss.

I, R. S. Zimmerman, Clerk of the Court in said District, do hereby certify that Hon. Paul J. McCormick whose genuine signature is subscribed to the annexed writing, was, at the time of the signing the same, Judge of said Court, duly commissioned and qualified.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said Court at the City of Los Angeles on the 20 day of November, 1940.

(Seal of the District Court).

(Seal) R. S. Zimmerman
Clerk of the District Court for the Southern District of the State of California.

[Stamped] Office of Indian Affairs Received Jan. 14 1941 2520.

Case No. 1321 O'C. Arenas vs. U. S. Petr's Exhibit No. 6. Date 2/10/48. No. 6 in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[PLAINTIFF'S EXHIBIT NO. 6A]

12046

5-378

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

Washington, February 6, 1948

I, James W. Hutchison, Acting, Commissioner of Indian Affairs, do hereby certify that the paper hereunto attached is a true copy of the original as the same appears of record in this Office.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed on the day and year first above written.

(Seal)

J. W. Hutchison
Acting Commissioner.

Land Division
Claims
50045-42
4843-41
J T R

CHICAGO, ILLINOIS.

Jun 3 1943

David D. Sallee, Esq.,
Attorney at Law,
806 Garfield Building,
Los Angeles, California.

(Petitioner's Exhibit No. 6A)

My dear Mr. Sallee:

The attorneys' contract between you and Lee Arenas of the Palm Springs Indian Reservation, California, has not heretofore received administrative sanction for reasons which may be briefly outlined thus:

(1) Sections 2103-2106 of the Revised Statutes (now Sections 81-84, Title 25 U. S. C.) pursuant to which the purported contract is drawn are inapplicable to contracts between individual Indians and attorneys employed by them in their individual capacity. Rather the sections mentioned deal primarily with tribal contracts affecting tribal matters and pursuant to which attorneys retained by an Indian tribe, under proper authorization from the tribal authorities, must have such contracts executed before a judge of a court of record. Contracts with individual Indians require no such formality. See the Act of June 30, 1913 (38 Stat. 97; Title 25 U. S. C. Section 85).

(2) The manifest purpose of the contract between you and Mr. Arenas is to compel recognition by the United States Government, including the Secretary of the Interior and the Commissioner of Indian Affairs, of the alleged right of Lee Arenas and other members of his family to the allotment of certain lands within the Palm Springs Indian Reservation, described in detail on pages 2 and 3 of the contract at hand. As we view it, the legal right of the Indians at Palm Springs Indian Reservation to compel recognition of their claim to right of allotment in severalty has previously been adjudicated by the courts and decided against the contention of these Indians: See the case of Genevieve P. St. Marie, et al v. United States

(Petitioner's Exhibit No. 6A)

(24 Fed. Sup. 237; affirmed 108 Fed. 2d 876; certiorari denied by the Supreme Court on October 14, 1940). The legal issues involved having thus been definitely determined and disposed of by the courts, it is not seen wherein any good purpose would now be served by encouraging other individual members of this band to indulge in fruitless and apparently hopeless litigation. This does not mean to imply of course that this Office would decline to consider or approve a proper contract under appropriate circumstances, if correctly drawn and executed.

(3) As to the contract at hand, ordinarily we do not favorably consider such contracts between Indians and their attorneys, involving civil actions at least, unless the fee or compensation to be allowed the attorneys for services rendered is on what we term a combination "contingent fee and quantum meruit basis." That is, and briefly, no recovery, no fee and in the event of recovery the fee allowed is to be determined on a quantum meruit basis by the Commissioner of Indian Affairs or the Secretary of the Interior. Pages 5, 6, and 7 of the contract between you and Mr. Arenas imply that your fee and necessary expenses are to be paid "from the property recovered," but as to the fee itself (page 5) that is fixed at 10 per cent of the amount of the reasonable value of certain property previously described in the contract. That description covers four town lots of two acres each in Section 14; four tracts of five acres each and four tracts of 40 acres each in Section 26, Township 4 South, Range 4 East.

While a fee of 10 per cent in itself is ordinarily not regarded as excessive yet we do know that much of the property at Palm Springs is quite valuable, particularly

(Petitioner's Exhibit No. 6A)

the town lots in Section 14 and hence we would not feel disposed to consider favorably a contract contemplating a flat fee even of 10 per cent where the property rights involved may run into high figures.

These are but additional comments or suggestions as to the form and substance of the contract at hand, but in view of the fundamental objection under number 2 above, possibly any further comment at this time would be superfluous.

In connection with the subject matter generally; i. e. contracts between individual Indians and attorneys employed by them, you appreciate that the Indians as citizens have the same right as other citizens to negotiate valid and binding contracts with third parties, including attorneys, without approval by this Office or the Department provided the obligations incurred or to be incurred under such contracts do not affect tribal or other property rights subject to control or supervision by this Department. In other words, unless payment for services rendered is to be had out of restricted funds or other assets belonging to the Indians, approval of such contracts by this Department is not required, as a matter of law.

Sincerely yours,

(Seal) (Signed) Walter V. Woehike
Assistant to the Commissioner

MLM
5-MS-29
cc to Mission Agency

Case No. 1321. Arenas vs. U. S. Petitioner's Exhibit No. 6A Date 2/10/48. No. 6A in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[PETITIONER'S EXHIBIT NO. 7]

POWER OF ATTORNEY AND CONTRACT

Know All Men By These Presents: That I, Lee Arenas, an enrolled Indian and member of the Palm Springs, or Agua Caliente, Indian Reservation, Riverside County, and State of California, have constituted, appointed and made, and by these presents do make, constitute and appoint David D. Sallee, John W. Preston and Oliver O. Clark, Esq., of Los Angeles, California, my true and lawful Attorneys, for me and in my name, place and stead to do all things lawful, proper and right in my behalf as a member of said tribe and reservation, and particularly to look after and protect my rights, and the rights of the members of my family, in respect to all rights, including our allotments which I have selected as the head of the family for myself and my children, and to protect us in the use and occupancy of the same and doing all things necessary in our behalf. That full power and authority is hereby granted to David D. Sallee, John W. Preston and Oliver O. Clark, to appear before any and all the Departments of the United States in my behalf, or any of the Courts to which it may be necessary to apply; and to also defend our interests in any Courts or tribunals. I hereby agreeing to pay my said Attorneys upon a quantum meruit basis for services rendered, and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family. All to be subject to the rules and regulations of the Department of the Interior.

I, Hereby Giving and Granting to My Said Attorneys full power of substitution and assistance to perform every act and transaction necessary to be done in our behalf the same as I might or could do if personally present; I hereby

(Petitioner's Exhibit No. 7)

ratifying and confirming all that my said Attorneys, assistants or substitutes may lawfully do, or cause to be done in our behalf. This contract is irrevocable except upon proper, fair and just termination of the same, particularly payment of costs, expenses and fees earned.

In Witness Whereof I have hereunto set my hand this 1st day of February, A. D., 1945.

Lee Arenas

The State of California,
County of Riverside—ss.

Be it known that on this 1st day of February, 1945, before me, the undersigned Notary Public in and for said County and State, personally appeared the above named maker of this contract and power of attorney, and to me known to be the identical person, and who acknowledged the execution thereof to be his free act and deed for the purposes in said above contract and power of attorney set forth.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal the day and year in the above certificate set forth.

(Seal) Benton Beckley

Notary Public in and for the County of Riverside, State of California

My Commission Expires June 9, 1947.

Case No. 1321 O'C Civil. Arenas vs. U. S. Petitioner's Exhibit No. 7. Date 2/10/48. No. 7 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[PETITIONER'S EXHIBIT NO. 8]

POWER OF ATTORNEY AND CONTRACT

Know All Men By These Presents: That I, Marian Therese Arenas, an enrolled Indian and member of the Palm Springs, or Agua Caliente, Indian Reservation, Riverside County, and State of California, have constituted, appointed and made, and by these presents do make, constitute and appoint David D. Sallee, John W. Preston and Oliver O. Clark, Esq., of Los Angeles, California, my true and lawful Attorneys, for me and in my name, place and stead to do all things lawful, proper and right in my behalf as a member of said tribe and reservation, and particularly to look after and protect my rights, and the rights of the members of my family, in respect to all rights, including our allotments which I have selected as the head of the family for myself and my children, and to protect us in the use and occupancy of the same and doing all things necessary in our behalf. That full power and authority is hereby granted to David D. Sallee, John W. Preston and Oliver O. Clark, to appear before any and all the Departments of the United States in my behalf, or any of the Courts to which it may be necessary to apply; and to also defend our interests in any Courts or tribunals. I hereby agreeing to pay my said Attorneys upon a quantum meruit basis for services rendered, and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family. All to be subject to the rules and regulations of the Department of the Interior.

I, Hereby Giving and Granting to My Said Attorneys full power of substitution and assistance to perform every act and transaction necessary to be done in our behalf the same as I might or could do if personally present; I here-

(Petitioner's Exhibit No. 8)

by ratifying and confirming all that my said Attorneys, assistants or substitutes may lawfully do, or cause to be done in our behalf. This contract is irrevocable except upon proper, fair and just termination of the same, particularly payment of costs, expenses and fees earned.

In Witness Whereof I have hereunto set my hand this 1st day of February, A. D., 1945.

Marian Therese Arenas

The State of California,
County of Riverside—ss.

Be it known that on this 1st day of February, 1945, before me, the undersigned Notary Public in and for said County and State, personally appeared the above named maker of this contract and power of attorney, and to me known to be the identical person, and who acknowledged the execution thereof to be his free act and deed for the purposes in said above contract and power of attorney set forth.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal the day and year in the above certificate set forth.

(Seal) Benton Beckley

Notary Public in and for the County of Riverside, State of California

My Commission Expires June 9, 1947.

Case No. 1321. Arenas vs. U. S. Petitioner's Exhibit No. 8. Date 2/10/48. No. 8 Identification. Date 2/20/48. No. 8 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[PETITIONER'S EXHIBIT NO. 14]

* * * * * * * * *

[Crest]

AMERICAN RIGHT OF WAY AND APPRAISAL CONTRACTORS

JOS. A. GALLAGHER & SONS

J. A. Gallagher, Sr.,
President
J. A. Gallagher, Jr.,
Vice-President
R. A. Martin,
Secretary

1337 Edgecliffe Drive
Los Angeles 26, California
Telephone NOrmandie 1-3017

December 9, 1947

John Preston, Oliver Clarke and David Sallee
Attorneys at Law
c/o David Sallee
Garfield Building
Los Angeles, California

Re: Appraisal of Portions of
Sections 14 and 26, Agua
Caliente Reservation,
Palms Springs, California

Gentlemen:

Pursuant to your request and authorization thereof under date of November 4, 1947, for appraisal of 94 acres, more or less, (4 acres in Section 14 and 90 acres in Section 26, Township 4 South, Range 4 East, Agua Caliente Indian Reservation, Riverside County, California), which said appraisal is made for the purpose of determining attorney's fees to be charged for legal work performed cov-

(Petitioner's Exhibit No. 14)

ering the above referred to acreage, I have made a careful investigation and analysis of subject property for the purpose of estimating its fair market value as of current date.

As the result of this study, I am of the opinion that the fair market value of the property under appraisement as of this date is:

One Million Forty-seven Thousand Dollars ($1,047,000.00).

I have appraised subject property as a whole and I have accepted as being accurate the plat of survey which was used in arriving at the fair market value—which said plat was prepared by J. F. Davidson, Civil Engineer, Riverside, California; also, Exhibit Map #109—showing portion of Agua Caliente Reservation and approved allotments.

You will find here following some descriptive and factual data upon which this conclusion is partially predicated.

Also, be advised that I am prepared to testify in court in this matter.

Joseph A. Gallagher, Sr.
Joseph A. Gallagher, Sr.
President, American Right of Way and Appraisal Contractors

* * * * * * * * *

Case No. 1321 O'C. Arenas vs. U. S. Petitioner's Exhibit No. 14. Date 2/11/48. No. 14 in Evidence. Clerk, U. S. District Court, Dist. of Calif. Louis J. Somers, Deputy Clerk.

[PETITIONER'S EXHIBIT NO. 20]

JOHN W. PRESTON
OLIVER O. CLARK
DAVID D. SALLEE
712 Rowan Building
458 South Spring Street
Los Angeles 13, California
MAdison 2567
Petitioners and Attorneys for Plaintiff

In the District Court of the United States, Southern District of California, Central Division

Lee Arenas, Plaintiff, vs. United States of America, Defendant. No. 1321 O'C—Civil

Under the powers of attorney granted by the group of Indians at Palm Springs to John W. Preston, Oliver O. Clark and David D. Sallee, complaints were prepared in 1945, but not filed, for the following:

Lena Jessica Lugo Welmas	Nicholosa Sol
Florida Patencio	Frank Segundo
John J. Patencio	Clemente Segundo
Albert Patencio	Willie Marcus Belardo

Matilda Patencio Welmas Saubel

On April 24, 1945, the following actions were filed:

No. 4401—Carrie Pierce Casero
" 4402—LaVerne Miguel Milanovich
" 4403—Lucy Pete
" 4404—Annie Pierce
" 4405—Ramalda Taylor

(Petitioner's Exhibit No. 20)

On February 9, 1945, the following actions were filed:

No. 4235—Viola Hatchitt

No. 4236—Juana Hatchitt

On January 9, 1947, action No. 6221-PH in re Eleuteria Brown Arenas was filed, and is now pending.

On February 16, 1948, an action was filed in the District Court of the United States for the District of Columbia, against Julius A. Krug, Secretary of the Interior of the United States, on behalf of the following named Palm Springs Indians:

Ramalda Lugo, aka Ramalda Lugo Taylor
Carrie Pierce Casero Annie Pierce
Juana Saturnino Hatchitt Viola Juanita Hatchitt
Lena Jessica Lugo, aka Lorene L. Welmas
LaVerne Milanovich, aka LaVerne Virginia Miguel
Elizabeth Pete Anthony (Andreas) Joseph
Joe Patentio, aka John J. Patencio
Florida Patencio, aka Flora Patencio
Santo Albert Patencio
Clemente Segundo, aka C. P. Segundo
Francis Segundo, aka Francisco Segundo
Matilda Patencio, aka Matilda T. Saubel

Case No. 1321 O'C. Arenas vs. U. S. Petitioner's Exhibit No. 20. Date 3/8/48. No. 20 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[RESPONDENT'S EXHIBIT 1]

* * * * * * * * *

Member American Institute of Real Estate Appraisers

BERNARD G. EVANS
Realtor – Appraiser
138 E. Highland Avenue
San Bernardino, California

Telephone 7857

Lands Division, Dept. of Justice
808 Federal Building
Los Angeles, California

February 7, 1948

Attention: Mr. Irl Brett, Special Assistant to the Attorney General

Gentlemen:

Re: Arenas vs. U. S. A.
Case No. 1321 – WM

Persuant to your authorization and request I have made an appraisal of the Arenas properties in the City of Palm Springs, the legal descriptions of which were furnished by your office.

In my opinion the fair market value of the fee title of the properties is the sum of Two Hundred Eleven Thousand Five Hundred Dollars ($211,500.00).

The complete report on these properties is enclosed herewith and further information is contained in the volume of supplementary data made a part hereto.

Very truly yours,
B. G. Evans
Bernard G. Evans, M.A.I.

BGE:s

* * * * * * * * *

Case No. 1321 O'C. Arenas vs. U. S. Respondent's Exhibit 1. Date 2/20/48. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[RESPONDENT'S EXHIBIT L]

Law Offices
DAVID D. SALLEE
806 Garfield Building
Los Angeles 14, Cal.
TRinity 6225

December 28, 1943

Mr. and Mrs. Lee Arenas
Palm Springs, California

Re: Lee Arenas vs. U. S. of America

Dear Mr. and Mrs. Arenas:

I did not want to take the time last night to talk to you on the telephone on long distance for two reasons; one that it was running up in unnecessary costs and second, a machine was waiting for me and I did not have the time.

Yesterday I received a telegram from Washington, D. C. from the Clerk of the United States Supreme Court requesting that an additional $35.00 be immediately forwarded to said clerk to cover certain costs in the above entitled case. There is now due a balance of $85.00 I have not been repaid for myself that I have sent to Washington. I have repeatedly requested that you send me in some money for the last two or three months, and it has been almost impossible to get anything out of you. You knew on November 12th when I was in Palm Springs that there was a balance of $50.00 due me and you have neglected to send it to me. You say you have other bills, all right, if you won't protect your property you won't have anything to pay other bills, nor anything for yourself. This litigation comes first in everything. I am trying to save your property for you, and it is worth well

(Respondent's Exhibit L)

a quarter million dollars. I am just getting tired of having to continually argue with you over these costs.

This is the first win and it is an important win for you in your fight. The United States Supreme Court does not grant these writs unless there is real merit in the case, and I am as confident of winning this case as I am that I will be alive tomorrow. Marian you have acted very sulky and I don't like it. You folks spend money right and left, but you have got to change and spend some money to help win this fight. Of course if you don't want your property and want to be put in a gulch and have only $25 or $30 a month to live on, all well and good, because that is where you will end up at if you don't use real business sense and cooperate with me. Lee I want you to read this letter thoroughly and I want you to send in this $85.00 because I need it.

I have got some more briefs to file in Washington before our hearing which will come up some time in March or April I presume, and I want a long talk with you relative to certain other matters within the next ten days. I would like to have you come to Los Angeles the first part of next week.

With kindest personal regards to yourself and wishing you a Happy New Year and awaiting your immediate response to this letter I remain

Yours truly,

David D. Sallee
DAVID D. SALLEE

Case No. 1321 O'C. Arenas vs. U. S. Respondent's Exhibit L. Date 2/20/48. No. L in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[RESPONDENT'S EXHIBIT N]

Law Offices
DAVID D. SALLEE
806 Garfield Building
Los Angeles 14, Cal.
TRinity 6225

September 24, 1943

Mr. and Mrs. Lee Arenas
Palm Springs
California

Dear Lee and Marion:

I just O. K.'d the final draft of the Petition for Certiorari in Lee's case this morning. It is now in the printer's hands and will be filed this coming week. We have associated with us on this, one of the leading lawyers in the West, a man who who used to be on the Supreme Court of the State of California, and he is a*n* enthusiastic as we are that the ultimate outcome should be in our favor. I don't know what the printing bill will be, as we have to print a good many of these because the requirement of the Supreme Court is heavy; so call me up in the next day or two and I will give you some more information.

Trusting you are both in the best of health, I remain,

Yours truly,

David D. Sallee
DAVID D. SALLEE

DDS–w

[Written]: Marian Do you have any peaches left

Case No. 1321 O'C. Arenas vs. U. S. Respondent's Exhibit N. Date 3/29/48. No. N in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J. Somers, Deputy Clerk.

[Endorsed]: No. 12046. United States Court of Appeals for the Ninth Circuit. Lee Arenas, Appellant, vs. John W. Preston, Oliver O. Clark and David D. Sallee, Appellees. United States of America and Lee Arenas, Appellants vs. John W. Preston, Oliver O. Clark and David D. Sallee, Appellees. Supplemental Transcript of Record. Appeals From the United States District Court for the Southern District of California, Central Division.

Filed January 4, 1949.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. .....

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER EXTENDING TIME FOR FILING THE RECORD AND DOCKETING THE APPEAL IN THE ABOVE ENTITLED ACTION

Upon reading and filing the foregoing affidavit and stipulation,

It is Hereby Ordered that the appellant, Lee Arenas, be and he hereby is granted to and including October 1, 1948, in which to prepare and file the record and docket the appeal in the above entitled action and that he be allowed to file his bond on appeal in the sum of $250 at any time not less than five (5) days before the filing of such record and the docketing of such appeal in this Court.

Dated: August 13, 1948.

(Seal) WILLIAM DENMAN
Circuit Judge

A True Copy. Attest: Aug. 13, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Aug. 13, 1948. Paul P. O'Brien, Clerk.

[Title of United States Court of Appeals and Cause]

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL IN THE ABOVE ENTITLED ACTION

Upon reading and filing the application of Appellants Lee Arenas and United States of America, the affidavit of Irl D. Brett, Esq., and the stipulation of Appellees, John W. Preston, Oliver O. Clark and David D. Sallee,

It Is Hereby Ordered that Appellants, Lee Arenas and United States of America, be and each of them hereby is granted to and including September 15, 1948 in which to prepare and file the record and docket the appeal in the above entitled action, heretofore filed by them on June 30, 1948, from that certain Judgment made and entered by the United States District Court for the Southern District of California, Central Division, in Case No. 1321-O'C Civil, on May 3, 1948 in favor of John W. Preston, Oliver O. Clark and David D. Sallee, and against Lee Arenas and United States of America, which said Judgment was entered in C. O. Book 50 at page 488 in the Office of the Clerk of said District Court.

Dated: August 23d, 1948.

(Seal) WILLIAM DENMAN
Judge

A True Copy. Attest: Aug. 25, 1948. Paul P. O'Brien, Clerk; by Frank H. Schmid, Deputy Clerk.

[Endorsed]: Filed Aug. 23, 1948. Paul P. O'Brien, Clerk.

[Title of United States Court of Appeals and Cause]

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL IN THE ABOVE ENTITLED ACTION

Upon reading and filing the application of appellants Lee Arenas and United States of America and the affidavit of Irl D. Brett, Esq.,

It Is Hereby Ordered that appellants Lee Arenas and United States of America be and each of them hereby is, granted to and including October 1, 1948, in which to prepare and file the record and docket the appeal in the above entitled action, heretofore filed by them on June 30, 1948, from that certain Judgment made and entered by the United States District Court for the Southern District of California, Central Division, in case No. 1321-O'C Civil, on May 3, 1948, in favor of John W. Preston, Oliver O. Clark and David D. Sallee, and against Lee Arenas and United States of America, which said Judgment was entered in Civil Order Book 50 at page 488, in the office of the Clerk of said District Court.

Dated: September 10, 1948.

(Seal) ALBERT LEE STEPHENS
Circuit Judge

A True Copy. Attest: Sep. 15, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Sep. 15, 1948. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 12046

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER EXTENDING TIME FOR FILING THE RECORD AND DOCKETING THE APPEAL IN THE ABOVE ENTITLED ACTION

Upon reading and filing the foregoing affidavit,

It Is Hereby Ordered that the appellant, Lee Arenas, be and he hereby is granted to and including the 1st day of November, 1948, in which to prepare and file the record and docket the appeal in the above entitled action and that he be allowed to file his bond on appeal in the sum of $250.00 at any time not less than five (5) days before the filing of such record and the docketing of such appeal in this Court.

Dated: September 30, 1948.

CLIFTON MATHEWS
Circuit Judge

[Endorsed]: Filed Sep. 30, 1948. Paul P. O'Brien, Clerk.

[Title of United States Court of Appeals and Cause]

STATEMENTS OF POINTS AND DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Lee Arenas and the United States of America, appellants in the above-entitled case, adopt the statement of points filed in the District Court as the statement of points to be relied upon in this Court, and desire that the whole of the record as filed and certified be printed in its entirety.

Respectfully submitted,

J. EDWARD WILLIAMS
Acting Assistant Attorney General

ROGER P. MARQUIS
JOHN C. HARRINGTON
Attorneys, Department of Justice,
Washington, D. C.

[Endorsed]: Filed Oct. 1, 1948. Paul P. O'Brien, Clerk.

[Title of United States Court of Appeals and Cause]

ORDER FOR ENLARGING TIME FOR FILING RECORD ON APPEAL

Good cause appearing therefor and upon reading the affidavit of John M. Ennis, who has been retained as one of the attorneys for appellants Lee Arenas and United States of America, It Is Hereby Ordered that Lee Arenas and United States of America be granted an enlargement of time for filing record on appeal to and including the 15th day of November, 1948. Affiant fails to show appellant has ordered the transcript of the hearing below.

WILLIAM DENMAN
Judge of the United States Court of Appeals

[Endorsed]: Filed Nov. 1, 1948. Paul P. O'Brien, Clerk.

[Title of United States Court of Appeals and Cause]

ORDER FIXING AND ALLOWING ATTORNEY'S FEES AND NECESSARY EXPENDITURES AND IMPRESSING LIEN UPON LAND OF LEE ARENAS AS SECURITY THEREFOR, AND ORDER SUBSTITUTING ATTORNEYS FOR LEE ARENAS

Pursuant to the stipulation filed herein by Lee Arenas and John J. Taheny, and good cause appearing, the court hereby fixes the sum of $4,550.00 as the reasonable value of the legal services rendered by the said John J. Taheny in behalf of said Lee Arenas in this court and in the

United States District Court in connection with the controversy which is now the subject of appeal in this court, which sum has not been paid; and further fixes the sum of $410.98 as the unpaid balance owing by said Lee Arenas to the said John J. Taheny by reason of reasonable sums necessarily expended by the said John J. Taheny at the request of and in behalf of said Lee Arenas in the conduct of said litigation;

And it further appearing that the said Lee Arenas has stipulated that he will deliver to said John J. Taheny the note of himself and his wife, Marian Arenas, in the sum of $4,960.98 to evidence said indebtedness;

And it appearing to the court that it is proper that security be required for the payment of said indebtedness as a condition to the granting of the motion of said Lee Arenas for substitution of attorneys;

Now, Therefore, It Is Hereby Ordered that a lien be and the same is hereby allowed and awarded to the said John J. Taheny as security for the payment of said indebtedness in the amount of $4,960.98 for attorney's fees and necessary expenditures, which lien is hereby impressed upon the interest of the said Lee Arenas in and to the following lands located in the County of Riverside, State of California, described as follows, to-wit:

Parcel (a) Homesite: Lot 46, Section 14, Township 4 South, Range 4 East, S. B. B. & M., comprising two (2) acres;

Parcel (b) Irrigated: Tract No. 39, Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising five (5) acres;

Parcel (c) Homesite: Lot 47, Section 14, Township 4 South, Range 4 East, S. B. B. & M., comprising two (2) acres;

Parcel (d) Irrigated: Tract No. 40, Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising five (5) acres;

Parcel (e) Desert: Southeast ¼ of Northwest ¼ of Northwest ¼ of Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising of ten (10) acres;

Parcel (f) Desert: Southwest ¼ of Northeast ¼ of Northwest ¼ of Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising of ten (10) acres;

Parcel (g) Desert: East ½ of Southwest ¼ of Northwest ¼ of Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising twenty (20) acres;

Parcel (h) Desert: Southeast ¼ of Northwest ¼ of Section 26, Township 4 South, Range 4 East, S. B. B. & M., comprising forty (40) acres.

It Is Further Ordered that John M. Ennis, Esq., and Clifton Hildebrand, Esq., be and they are hereby substituted as attorneys for Lee Arenas in the place and stead of John J. Taheny, Esq.

Dated this 15th day of December, 1948.

WILLIAM DENMAN
WILLIAM HEALY
Judges of the U. S. Court of Appeals for the Ninth Circuit

Approved as to Form: Lee Arenas, John M. Ennis and Clifton Hildebrand, by Clifton Hildebrand, Attorneys for Lee Arenas. John J. Taheny, In Propria Persona.

[Endorsed]: Filed Dec. 15, 1948. Paul P. O'Brien, Clerk.

[Title of United States Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH APPELLANT LEE ARENAS WILL RELY IN THIS APPEAL

Appellant Lee Arenas appeals from the judgment of the trial court for the following reasons:

1. That the weight of evidence does not support the trial court's finding that attorneys' contract between Lee Arenas and David D. Sallee entered into on the 20th day of November, 1940 had been rescinded; that the trial court erred in failing to limit the fees awarded to all counsel to a total of ten (10%) per cent.

2. That even if such contract had been rescinded, and did not fix such limit the evidence does not support the trial court's finding that petitioner John W. Preston was entitled to a fee of twelve and one-half (12½%) per cent of the value of the lands in question. That the finding of the trial court in such regard fixed an excessive fee.

CLIFTON HILDEBRAND &
JOHN M. ENNIS

By Clifton Hildebrand

[Endorsed]: Filed Jan. 31, 1949. Paul P. O'Brien, Clerk.

No. 12046.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

OPENING BRIEF OF LEE ARENAS.

JOHN M. ENNIS and
CLIFTON HILDEBRAND,
312 A. G. Bartlett Building, Los Angeles 14,
Attorneys for Appellant Lee Arenas.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Statement of jurisdiction 1

Statement of the case 2

Specification of errors 3

The evidence 4

Second specification of error 18

Evidence on second specification of error 19

Conclusion 22

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Cormac v. Murphy, 58 Cal. App. 366, 208 Pac. 360	18
Duffill, Estate of, 188 Cal. 536, 206 Pac. 42	21
Kendrick v. Gould, 51 Cal. App. 712, 197 Pac. 681	21
Kirk v. Culley, 202 Cal. 501 261 Pac. 994	21
Miller v. Ballerino, 135 Cal. 566, 57 Pac. 1046	18
Porter v. Elizalde, 125 Cal. 204, 57 Pac. 899	16, 18

Statutes

United States Code, Title 25, Sec. 345	1, 2
United States Code, Title 28, Sec. 225(a)	1

Textbooks

90 American Law Reports, pp. 258, 265, anno	18

No. 12046.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

OPENING BRIEF OF LEE ARENAS.

Statement of Jurisdiction.

This is an appeal from a judgment of the United States District Court, Southern District of California, Central Division, entered in an equitable proceeding founded upon United States Code Title 25, Section 345, and the jurisdiction of this Court upon appeal is conferred by United States Code Title 28, Section 225(a).

Statement of the Case.

As stated in the opinion of the Court below this is an equitable proceeding under Section 345 of Title 25 of the United States Code, upon the petition of the appellees for an award of attorneys' fees and costs.

The appellees all acted as counsel for the appellant Lee Arenas in connection with his claim to certain land in Palm Springs, California, but were in the litigation for different periods of time. The appellee David D. Sallee was named as attorney for appellant Arenas as evidenced by a written contract of employment dated November 20, 1940. [Tr. p. 118; Pet. Ex. 6, Tr. p. 173.]

Under the provisions of this contract appellee Sallee was to receive 10% of the value of land obtained and was bound to pursue the litigation in question to and through the court of final resort. [Tr. p. 176.] He was authorized to associate with him such assistants, including attorneys, as he desired. [Tr. p. 176.]

There is some difference between the testimony of appellee Sallee and appellee Clark as to where the November 20, 1940, agreement was signed by appellant Arenas, or whether in fact two different agreements were signed [Tr. p. 145], but appellee Clark apparently was in the litigation from its inception as an associate of appellee Sallee. [Tr. p. 142.] The appellee Preston entered the litigation as counsel in September of 1943 at the request of appellee Clark. [Tr. p. 157.] About 18 months after appellee Preston entered the litigation another contract of employment was signed by appellant and all of appellees providing for compensation upon *quantum meruit* basis. [Pet. Ex. No. 7, Tr. p. 187.]

After Judge Preston's association the litigation was pressed through a hearing on the legal question in the United States Supreme Court in which appellees were successful; a trial on the merits in the United States District Court and an appeal from the judgment there obtained by appellees in the United States Court of Appeals for the Ninth Circuit where the judgment obtained by appellees below was affirmed in part, and reversed in part, which in effect allotted to appellant Arenas one-half of the land he claimed. Thereafter certiorari was denied and the present suit for attorney's fees and costs was instituted.

The Court below awarded to appellees Clark and Sallee 10% of the value of the lands allotted to Arenas. A further and additional award was made by the Court to appellee Preston of 12½% of the value of the said lands. The lands involved were valued at $211,500.00 by one appraiser and at $1,047,000.00 by another.

Specification of Errors.

1. THE COURT'S FINDING THAT ATTORNEYS' CONTRACT ENTERED INTO ON NOVEMBER 20TH, 1940, HAD BEEN SUPERSEDED AND RESCINDED IS NOT SUPPORTED BY THE EVIDENCE, AND HENCE THE COURT ERRED IN FAILING TO LIMIT THE ATTORNEYS' FEES AWARDED TO ALL COUNSEL TO A TOTAL OF TEN (10%) PER CENT.

2. ASSUMING FOR ARGUMENT'S SAKE THAT THE ATTORNEYS' CONTRACT OF NOVEMBER 20TH, 1940, HAD BEEN RESCINDED, THE COURT'S FINDING THAT APPELLEE PRESTON WAS ENTITLED TO A FEE OF TWELVE AND ONE-HALF (12½%) PER CENT OF THE VALUE OF THE LAND IS NOT SUPPORTED BY THE EVIDENCE. THE TRIAL COURT ERRED IN AWARDING AN EXCESSIVE FEE TO APPELLEE PRESTON.

The Evidence.

We quote here that portion of the evidence we believe to be essential in the determination of the issues:

Evidence bearing upon Specification of Error No. 1:

The contract of employment of November, 1940, limiting compensation of counsel to 10% was never rescinded or superseded. The appellee Sallee testified as follows:

> "Q. You have shown me the original of a document which bears the date of November 20, 1940, which recites that it is an agreement between Lee Arenas and David D. Sallee. Now, was that document executed in more than one original? A. Yes; two.
>
> Q. Were both signed and acknowledged in the form in which you have submitted a copy to me? A. Yes.
>
> Q. Were you present, Mr. Sallee, when Lee Arenas affixed his signature to that document—when he signed both originals? A. Yes, in the court room of Judge McCormick, before Judge Paul J. McCormick.
>
> Q. Lee Arenas was there? A. Yes, and on the stand for about two hours." [Tr. p. 118.]

> Q. Who prepared the document called the 'agreement'? A. I prepared the rough outline, then Oliver Clark and I went over it together, and he detailed it, and it was probably edited three or four times before its final form.
>
> Q. Was it ultimately drafted in your office and under your supervision? A. Yes.
>
> Q. Was it discussed with Mr. Arenas before you went with it to Judge McCormick? A. Yes.
>
> Q. Where? A. I don't remember. The first conference was out at his home under a tree, with Mr. Clark and me. We called on him, or in my of-

fice, I don't just remember, we had two or three conferences over the matter. Mr. Clark was in on a couple or three of them, and a couple of them I went over the outline with him myself, explaining it in detail.

Q. Was Mr. Clark present when these conversations took place? A. Two or three of them, yes." [Tr. p. 122.]

"Q. Did you or did you not tell him (Lee Arenas) that the agreement would not be effective until it was approved by the Commissioner of Indian Affairs or until it was approved by the Secretary of the Interior? A. I told him I would send the contract in to be approved, which I did after the Court had approved it here.

Q. Yes, Mr. Sallee, but did you tell him that it would not become effective until approved by the Commissioner of Indian Affairs or the Secretary of the Interior? A. *I didn't tell him, because in my opinion it was effective all the way through.*" [Tr. p. 123.]

"Q. Have you made any assignment orally or in writing of your interest in this agreement to anyone? A. Just my associates, that I would give them an interest in it.

Q. That was in writing? A. No, I walked off and forgot it, I had three copies made.

Q. When were the assignments made? A. When Judge Preston came into the case, I forget the date, Mr. Clark dictated the assignment.

Q. They were in writing and signed by you and delivered to Mr. Clark and Judge Preston? A. They were put in a file that Mr. Clark and I had, and not to Judge Preston, because Oliver said he had them at one time, he put them in that file." [Tr. p. 136.]

TESTIMONY OF OLIVER O. CLARK:

"Q. Did you also disclose to Judge Preston the text of the agreement of November 20, 1940? A. My recollection is that I brought a copy to Judge Preston's office.

Q. And left it with him, before Judge Preston entered into the employment of the case? A. Yes.

Q. At the time you commenced these conversations with Mr. Arenas looking toward a modification of the agreement of November 20, 1940, had you helped perform any legal services as counsel for Mr. Arenas in this case? A. Yes. I had begun the suit and carried it through the Circuit Court and to the point where the petition for certiorari was required to be filed before I discussed with Lee the modification of the original contract." [Pet. Ex. No. 4.]

"Q. Did you suggest to Lee Arenas that he obtain or seek or get the advice of any independent counsel before he modify the agreement?" [Tr. pp. 150-151.]

"Q. Did you tell Mr. Arenas, as a part of your conversation leading up to the signing of the documents dated February 1, 1945, that it was necessary for him to sign an agreement of that kind before further proceedings could be had in his case? A. No. Our relations were such that if Lee Arenas told me to go ahead on the basis of our oral understanding, it was just as good as if it was in writing, and the fact that that contract wasn't signed until after we had gone through the United States Supreme Court and had come back here for the trial of the case—

Q. Did you tell Mr. Lee Arenas in any of the conversations following the effective date of November 20, 1940, and prior to February 1, 1945, that you

could go no further with his case after the Circuit Court of Appeals had affirmed the summary judgment unless he would execute an agreement covering a larger fee? A. No.

Q. What did you tell him in that respect? A. I told him I thought it was advisable that Judge Preston be associated in the case, but that if he did not agree to it I would go to Washington and become admitted to the Supreme Court and file the petition while I was there, because I at all times had in mind that if Judge Preston would not become associated I would go ahead with the litigation through the Supreme Court.

Q. Did you contemplate that if you had gone through with the litigation to the Supreme Court and had obtained a reversal of the Circuit Court opinion that you would conduct further proceedings in whatever courts might be required until the trust patent was obtained? A. I did. In other words, I assume you want to know if I at any time suggested to Arenas that if I and Dave would go ahead without any additional lawyer, we would expect any compensation in addition to what our original contract provided for. No, I never had that in mind. I never suggested it to Arenas and the only reason the new contract for compensation was made was because of the additional services that we were able to obtain from Judge Preston being in the case." [Tr. pp. 152-153.]

Testimony of John W. Preston:

"Q. At the time that you started in that employment in 1943, you were informed of the provisions of the document dated November 20, 1940? A. Well, I have a reasonably good memory that I knew something about it—that they had a contract, and for

ten per cent, and that I didn't think it was enough, I remember that.

Q. Do you recall whether you personally told Lee Arenas that you didn't think it was enough before you started in on your employment? A. I didn't do that.

Q. I have in mind the document dated February 1, 1945, was after you had performed substantial portions of your services? A. You are right. I don't think I had any personal talk with Lee Arenas or that I informed him of anything.

Q. Whatever information he had came through others? A. Yes; that's right." [Tr. pp. 157, 158.]

"Q. Had you ever suggested to Mr. Arenas, Judge Preston, that he seek independent advice before he modified his contract of November 20, 1940, and prior to the time when he signed the documents dated February 1, 1945? A. I had no direct communication with Mr. Arenas on that.

Q. You had talked to him on other matters in the case, because you tried the case before that date, didn't you? A. I was at Mr. Arenas' house in Palm Springs once, and I examined Mr. Arenas as a witness at the time of the trial. I had a few talks with him in the corridor of the court room, and I don't remember ever talking to him any other time.

Q. I assume you talked to him before you put him on the stand? A. That's my custom to talk to a witness first, but I swear I don't remember talking to him.

Q. I wasn't present at the trial. Judge Preston, you have had broad experience both on the bench and as an attorney—now, having in mind Mr. Sallee's previous statements and Mr. Clark's previous statements as to what they told Mr. Arenas, is it your

opinion that Mr. Arenas was sufficiently informed of English and sufficiently educated to understand and comprehend the information and advice which he was being given? A. I certainly think he was competent at that time to transact business—as competent as the ordinary individual of the White Race. He showed on the witness stand intelligence that was very noticeable—he was commended by the Judge as being an intelligent witness—and if you will recall, the contract is simply a *quantum meruit* to be fixed by the court. It doesn't require a great deal of advice to make such a contract, and I think also it is valid under the law." [Tr. pp. 160, 161.]

Testimony of Lee Arenas:

"Q. By Mr. Taheny: Mr. Arenas, I now show you a document purporting to be a document or agreement signed (292) on November 20, 1940, between you and David D. Sallee. A. Yes; I did.

Q. Do you recall signing that contract I am showing you? What purports to be your signature, is that your signature? A. Yes.

Q. This last contract, which is marked Petitioners' Exhibit No. 6, provides for a fee of 10 per cent. A. Yes, sir.

Q. 10 per cent. A. 10 per cent.

Q. Did you understand at the time you signed that that it was to be for 10 per cent? A. Yes, sir.

Q. Now, at any time thereafter did Mr. Sallee or Mr. Clark or Mr. Preston or anybody else inform you that there was to be a different fee or a higher fee for the work done in this case in your behalf? A. They never say nothing about me—about it to me.

Q. Did Mr. Sallee at any time act as your attorney in another case that was filed against you by the

Government after the present suit was filed? A. Well, I am always depending on him, Mr. Sallee.

Mr. Preston: What is the answer, Mr. Reporter?

(Answer read by the reporter.) (293)

Q. By Mr. Taheny: Mr. Arenas, do you remember being served with some suit papers in a suit brought against you and a number of other Indians? A. Yes.

Q. 10 or 15 Indians? A. Yes.

Q. A suit in ejectment? A. In ejectment, I think.

Q. That was a suit filed about 1943? A. Something like that; yes.

Q. And at that time did Mr. Sallee agree to represent you in connection with that particular suit? A. He took that paper and he was going to defend me, on me, for me." [Tr. pp. 80, 81.]

"Q. By Mr. Taheny: Mr. Arenas, at any time at all were you informed that it will be necessary to associate Judge Preston in this case? A. No; I never know.

Q. Were you at any time informed that it will be necessary for you to pay a higher fee in order that Mr. Clark and Mr. Sallee will get another attorney to work with them on the case? A. Never knew anything about it." [Tr. p. 83.]

Testimony of Marian Therese Arenas, Wife of Lee Arenas:

"Q. Were these documents which are now in evidence as Exhibits 7 and 8 signed at the same time? A. Yes, sir.

Mr. Preston: What was the answer?

(Answer read by the reporter.)

The Witness: Yes.

Q. By Mr. Taheny: And at the time these documents were signed was anything said to you or to Mr. Arenas in your presence to the effect that either of these documents was to apply to the suit that is now involved in this case, that is, the suit of Arenas versus the United States? A. No, sir.

Q. At the time that Mr. Sallee told you that you needed an attorney was there anything said at that time about the necessity of you signing a contract? A. He said I had to have a power of attorney so he could defend me in that suit.

Q. Are you speaking now of the ejectment suit? (311) A. Yes, sir.

Q. And at all times thereafter it was your understanding that these two documents, Exhibits 7 and 8, applied only to the ejectment suit? A. That is right.

Mr. Preston: To which we object upon the ground that her understanding of Lee Arenas' document has nothing to do with it.

The Court: Overruled. The answer may stand.

Q. *By Mr. Taheny: Now, do you know whether or not the other Indians involved in that suit, with the ejectment suit, also signed similar powers of attorney on the same mimeographed form?* A. There are some that did; yes, sir.

Q. And these other Indians had no connection whatever with the suit of Arenas versus the United States which is now pending here? A. No.

The Court: Your answer was 'no'?

The Witness: Yes, sir." [Tr. pp. 94, 95.]

Referring to the *Quantum Meruit* agreement of February 1, 1945 [Pet. Ex. No. 7, Tr. p. 187], Mr. Sallee testified as follows:

"Q. By Mr. Brett: Now, Mr. Sallee, is it not a fact that following the dispatch of the letter which has just been marked as Respondents' Exhibit K, that you and Mr. Oliver O. Clark and Judge Preston, as associates, filed an answer in the ejectment action in Case No. 3184-O'C, which was against Lee Arenas and his wife; and, at the same time, also filed identical answers in the following ejectment (351) suits against other members of the Palm Springs Indian Tribe: 3185, 3187, 3188, 3189, 3190, 3192, 3193, 3196, 3197, 3198, 3199, 3200, and 3201 in this court?

Mr. Preston: Let me see them. Before you answer it, let me look at those, will you? Where are the answers? I do not see any.

Mr. Brett: I verified each one, for your information.

Mr. Preston: *And that is the date of December, 1944.* What is the question? I have forgotten what it is.

The Court: Let us not go over all that. What do you want to know about it?

Mr. Preston: We will stipulate that we filed answers in the cases recited and mentioned by the counsel in the fall of 1944; but we want it understood that we have the right to bring in here the list of cases also filed concerning these allotments at a later date.

The Court: Gentlemen, I can say I will take judicial notice of the records of this court, if you will call them to my attention.

Mr. Brett: That is satisfactory.

The Court: And give me judicial knowledge, I will take notice.

Q. By Mr. Brett: Mr. Sallee, you are familiar with Exhibits 7 and 8, the mimeographed form of agreements which have been offered in this case? (352) A. Yes.

Q. Did you not procure the mimeographing of those agreements? A. I did not. (I did.)

Q. And did you not circulate all of those agreements among all of the members of the Tribe of Palm Springs? A. No.

Mr. Preston: What is the answer? A. No.

Mr. Preston: 'No.'

Q. By Mr. Brett: Did you not circulate those among quite a large number of them? A. Quite a large number and signed them up.

Q. You commenced that circulation of quite a large number in preparation for filing the answers in the ejectment suits, did you not? A. I couldn't tell you the dates on them right now. They speak for themselves when they were signed." [Tr. pp. 100, 101 and 102.]

It is evident that the 10% contract of employment [Pet. Ex. 6, Tr. p. 173] dated November 20, 1940, had been carefully prepared through several drafts by Messrs. Sallee and Clark and that they had every opportunity therein to protect their rights. Judge Preston was also informed as to its terms. It was signed by Lee Arenas in Court after a two-hour session in which it was explained to him by Judge McCormick. He must have understood fully what it meant, and he had the benefit of independent advice from no less a source than a United States District Judge.

On the other hand there is shown great contrast as to the signing of the *Quantum Meruit* Agreement of February, 1945. [Pet. Ex. 7, Tr. p. 187.] Lee Arenas testified he had been told nothing about the need for greater attorneys' fees or a new arrangement for fees. He did know that Judge Preston was helping, but in his own words he was depending on Sallee for everything. [Tr. p. 81.] Mr. Sallee said "in his opinion the 1940 contract was effective all the way through." [Tr. p. 123.] Judge Preston entered the case in September of 1943, yet petitioners admit that no attempt was made to put into effect a new written contract for increased compensation until about 18 months later. It is noteworthy that this later *Quantum Meruit* Agreement was a mimeographed form and as admitted by petitioners, a number of other Palm Springs Indians were signed up on these same mimeographed forms in connection with petitioners representing these Indians in ejectment suits brought by the Government. These suits had no connection with the fees herein sought by petitioners.

The Trial Court erred in finding that the contract of November 20, 1940, was void [Tr. p. 63], since the contract did not deal with tribal land, but land allotted in severalty in 1927 to Lee Arenas and his relatives. This was so held in the judgment of the Court rendered May 14, 1945, which judgment was sustained as to the date of 1927 by the United States Court of Appeals for the Ninth Circuit.

The contract of November 20, 1940, was not superseded or rescinded by the so-called *Quantum Meruit* Agreement of February 1, 1945, which pertained to the ejectment suit. The *petitioner Preston* at no time had any agreement for compensation in the allotment lawsuit with Lee

Arenas, oral or written, *but by his own admission was an associate of Messrs. Sallee and Clark at the latter's request.* [Tr. p. 157.]

The Court erred in not limiting the total award of counsel fees to 10% of the value of the land, the amount specified in the contract of November 20, 1940.

It is not shown by the evidence that the Indian Lee Arenas had been informed fully or that he understood clearly what the petitioners now claim, that he was signing a contract to pay increased compensation when he signed the mimeographed form on February 1, 1945. [Pet. Ex. No. 7, Tr. p. 187.] It is plain from the evidence that Arenas was far short of having the clarity of understanding about the second agreement which the courts require concerning contracts between attorney and client when made after the confidential relationship has arisen. Yet this is the agreement upon which the Court awarded to Judge Preston 12½% of land valued at $1,047,000.00 by the petitioners' appraisers. This being in addition to the 10% awarded to Messrs. Clark and Sallee. This was clearly error, as is shown by the decisions:

> "In Blaike v. Post, 137 App. Div. 648, 122 N. Y. Supp. 292, it appeared that an attorney was employed by the defendant to bring and prosecute a suit to set aside a mortgage, and gave the defendant a receipt for $100 for disbursements, and in it stated that his compensation was to be 25 per cent of the amount recovered. A suit was brought, which was decided adversely to the plaintiff therein. Seven days before the decision in that suit the attorney procured the defendant to write him a letter, stating that he should receive, as full compensation for legal services, 10 per cent of the amount the defendant should net from

> the sale of the land in controversy, after paying the mortgages thereon and the advances made to him by different persons named. It was also stated that the agreement was to take the place and be in lieu of all other agreements. The action to recover for legal services was based on the subsequent agreement. The court said: 'The learned trial justice charged the jury that the plaintiff could not recover without proof "—that the agreement was fair, that the client acted freely and understandingly, that the client who executed the instrument fully understood its purport, and that it was made by him with full knowledge of all the material circumstances known to the attorney, and was in every respect free from fraud on the part of the attorney or misconception on the part of the client, and that a proper use was made by the attorney of the confidence reposed in him." That charge was undoubtedly correct. It is unnecessary to cite authority to support it, because at all events it is the law of this case on this appeal.'" (19 A. L. R., pp. 857, 858.)

There is some evidence offered by petitioners concerning the added value of Judge Preston as *associate counsel.*

This may be another method short of recision of the November 20, 1940, agreement, the only true contract of employment whereby petitioners might seek to justify extraordinary fees, or additional compensation. It is well settled however, that an attorney may not retain associate counsel at an increased cost to the client. This point and the limitation on the associated counsel's right to recover from the client are well covered in the leading case of *Porter v. Elizalde,* 125 Cal. 204, 57 Pac. 899. The facts here were: That an attorney Crittenden had rendered services to the appellant Elizalde in a contest of her hus-

band's will. Crittenden was brought into the litigation by Mrs. Elizalde's attorneys, Messrs. Graves and Boyce. Crittenden was introduced to Mrs. Elizalde and then interviewed her before and during the trial several times; discussed the case with her as to testimony and witnesses, *and Mr. Crittenden tried the case.*

Sometime later Crittenden's assignee sued Mrs. Elizalde for attorney's fees and recovered in the Court below. Upon appeal the Supreme Court reversed the judgment.

The Court's opinion in part is:

> "The respondent contends, however, that the appellant is liable for the value of the services rendered by reason of having accepted them without objection; that as she was present at the trial and made no objection to having Mr. Crittenden act in her behalf therein, she is under an implied obligation to pay their value. It is undoubtedly in general the rule that when one knows that another is rendering him services, and tacitly assents thereto, if nothing more appears the law will imply a provision on his part to pay for such services. The rule is not uniform or absolute, however, but will be recognized or refused according to the circumstances of the particular case in which it is invoked (see Moulin v. Columbet, 22 Cal. 508), and when it appears that the services were rendered under an express employment by an agent, or by a third person who assumed to act in the interest of the one in whose behalf they were rendered, the authority of that person and the terms of the employment become important factors in determining the liability or the right of recovery. The mere silence of the party will not be held to constitute such assent or acquiescence in the acts of the agent as to amount to a ratification or adoption of these acts, without also considering the circumstances under which the silence existed. Es-

pecially in a case like the present, where there was no authority in the defendant's attorney to engage counsel at her expense, and where he had agreed with her to pay all the expenses of the litigation, will the law refuse to imply from her mere silence a promise to pay for the services rendered under such employment. In Price v. Hay, 132 Ill. 543, it was held that the acquiescence of a client in the appearance of an attorney and performance of services by him in the case is not legitimate evidence from which a jury may infer an implied contract between them to pay for such services, where the client has previously employed other counsel therefor at a fixed fee. Similar rulings have been made in Holmes v. Board of Trade, 81 Mo. 137; Young v. Crawford, *supra;* Savings Bank v. Benton, 2 Met. (Ky.) 240; Evans v. Mohr, 153 Ill. 561; Ennis v. Hultz, 46 Iowa 76." (*Porter v. Elizalde,* 125 Cal. 204, pp. 207, 208.)

See also:

Miller v. Ballerino, 135 Cal. 566, 57 Pac., page 1046;

Cormac v. Murphy, 58 Cal. App. 366, 208 Pac., page 360; also

90 A. L. R. 258 and Annotations commencing at page 265.

SECOND SPECIFICATION OF ERROR.

Even if the November 20, 1940, agreement had been effectually rescinded or superseded by the mimeographed form of February 1, 1945, it was error upon the Court's part to allow 12½% of the land value to Judge Preston, in addition to the 10% awarded to Messrs. Sallee and Clark. To be conservative, if the values given by the high

and the low appraisers were to be averaged, the value figure would be:

$$\$211,500.00+\$1,047,000.00=\$1,258,500.00=\frac{\$629,250.00}{2}$$

The attorneys' fees computed upon the averaged value would then be for Messrs. Sallee and Clark: $62,925.00; for Judge Preston, 98,636.25

Total Fees $161,561.25

Clearly this is an excessive fee to be allowed Judge Preston in view of the record. First it should be remembered that the bulk of the costs, including travel to San Francisco and Washington, D.C., were contributed by Lee Arenas or perhaps in part by other Indians.

EVIDENCE ON SECOND SPECIFICATION OF ERROR, TESTIMONY OF T. B. COSGROVE:

"Q. I say, you have read and familiarized yourself in a general way with the contents of the briefs which were filed in the Circuit Court of Appeals in connection with the appeal of Lee Arenas from the summary dismissal? A. Well, I will say yes, but permit me to say that when I examined the briefs I did not examine the briefs like a judge of the Circuit Court of Appeals would who would be called upon to write an opinion, because I knew the opinions had already been written and the case had been decided. I examined the briefs only for the purpose of determining what the point was that was presented; and then I examined the decisions of the court very carefully to see how the court had decided these issues of law and fact for the purpose of determining, not how the case should be decided, but the extent and the

character of skill required to present the matter anew to the Circuit Court of Appeals and to the Supreme Court. So if you have in mind the purpose for which I examined the briefs, the answer would be yes. (279)

Q. Well, did you notice any difference, any essential difference, in the points presented in the appeal brief in the Circuit Court of Appeals and the points presented in the petition for certiorari filed in the Supreme Court of the United States, the petition that was filed about October 29, 1943, that is the first petition for certiorari in the Arenas case? A. I noticed—I am not certain about dates; I do not carry dates in mind—*but I think that there isn't any fundamental or clearly ascertainable distinction in the points that were presented originally to the Circuit Court of Appeals and to the Supreme Court of the United States in the first appeal in the Arenas case.* The difference is in the manner in which they were presented and the success that accompanied the presentation of them. (280)" [Tr. pp. 76, 77.]

In reading this testimony it should be borne in mind that the appeal to the Circuit Court of Appeals had been completed before Judge Preston entered the case.

Testimony of Petitioner Clark:

"Q. Mr. Clark, in the report of the Arenas case decided by the Supreme Court, in 88 Law Ed. at pages 1373 and 1374, it is indicated in the reporter's notes of the briefs by both sides and of the appearances that, in addition to Judge Preston appearing and arguing the case, you also appeared and argued the case; is that correct? A. Yes; I did. We divided the case into two parts, Judge Preston opened the argument on the question of the statutory liability,

> I followed on the question of estoppel, and I presented the rebuttal argument at Judge Preston's request in relation to the entire case. That was my first and only appearance before that court." [Tr. pp. 115, 116.]

The record shows that thereafter Judge Preston and his associates spent two court days trying the case upon the merits in the District Court and one day in court in the Circuit Court of Appeals on the appeal. In addition the petitioners did, it appears, a substantial amount of work in preparation.

The decisions upon the value of legal services are so varied, depending upon the facts of each case, that it seems pointless to give citations here.

While the appellant Arenas does not concede that the Court could properly award any fees over and above the 10% limitation contained in the contract of employment of November 20, 1940, disregarding this for solely the sake of argument, the award of 12½% to Judge Preston is so excessive as to clearly constitute prejudicial error upon the part of the Court below.

The Courts, including the Appellate Courts, have the absolute discretion to fix attorneys' fees irrespective of what opinions may be given by lawyer-witnesses upon the alleged value of legal services rendered.

> *Estate of Duffill,* 188 Cal. 536, 206 Pac. 42;
> *Kendrick v. Gould,* 51 Cal. App. 712, 197 Pac. 681;
> *Kirk v. Culley,* 202 Cal. 501, 261 Pac. 994.

Conclusion.

It is respectfully submitted that in respects of the above assigned, the Trial Court committed prejudicial error and that the judgment should be set aside and reversed.

Dated: Los Angeles, May 2, 1949.

JOHN M. ENNIS and
CLIFTON HILDEBRAND,
By JOHN M. ENNIS,
Attorneys for Appellant Lee Arenas.

No. 12046

In the United States Court of Appeals for the Ninth Circuit

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, APPELLEES

UNITED STATES OF AMERICA AND LEE ARENAS, APPELLANTS

v.

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UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES AND LEE ARENAS

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Statutes involved	2
Questions presented	3
Statement	4
Specifications of errors	10
Summary of argument	10
Argument:	
I. The district court had no jurisdiction to impress a lien upon the trust patent allotments or to enforce such lien by appointing a receiver or ordering the sale of the property	13
A. Introductory—The interest of the United States	13
B. The decision below cannot be reconciled with the decision of this Court on the previous appeal (United States v. Arenas, 158 F. 2d 730)	15
C. The United States in the 1894 Act as amended did not consent to imposition of a lien upon the property to secure payment of attorneys' fees	17
D. The decision below is in direct contradiction to the limitations imposed by Congress upon alienation of the property	21
E. The cases relied upon by the court below do not support its assumption of jurisdiction in the instant case	26
II. The district court had no jurisdiction to entertain a petition for allowance of attorneys' fees under the Act of 1894 as amended	29
Conclusion	31
Appendix	32

CITATIONS

Cases:	
American Surety Co. v. *United States*, 112 F. 2d 903	24
Anglin & Stevenson v. *United States*, 160 F. 2d 670, certiorari denied 331 U.S. 834	29
Arenas v. *United States*, 322 U.S. 419	5, 20, 23
Arenas v. *United States*, 137 F. 2d 199	5
Arenas v. *United States*, 60 F. Supp. 411	5
Arenas, Lee v. *United States*, No. 1321 O'C-Civil	5
Brent v. *Bank of Washington*, 10 Pet. 596	27
Causey v. *United States*, 240 U.S. 399	27
Federal Housing Administration v. *Burr*, 309 U.S. 242	19
Galveston, H. & S. A. Ry. Co. v. *Wallace*, 223 U.S. 481	19
Gerard v. *United States*, 167 F. 2d 951	17
Gillaspie, In Re, 190 Fed. 88	17
Guaranty Trust Co. v. *United States*, 304 U.S. 126	27
Heckman v. *United States*, 224 U.S. 413	24, 27
Hoffman v. *McClelland*, 264 U.S. 552	28
Hy-Yu-Tse-Mil-Kin v. *Smith*, 194 U.S. 401	31
Keifer & Keifer v. *Reconstruction Finance Corp.*, 306 U.S. 381	19
McKnight v. *United States*, 98 U.S. 179	27
Minnesota v. *United States*, 305 U.S. 382	16
Monson v *Simonson*, 231 U.S. 341	24
Reconstruction Finance Corp. v. *Menihan Corp.*, 312 U.S. 81	19
St. Marie v. *United States*, 108 F. 2d 876	5
Sprague v. *Ticonic Bank*, 307 U.S. 161	27
Starr v. *Long Jim*, 227 U.S. 613	24

	Page
United States v. *Anglin & Stevenson*, 145 F. 2d 622, certiorari denied 324 U.S. 844	12, 26
United States v. *Arenas*, 158 F. 2d 730, certiorari denied 331 U.S. 842	4, 6, 11, 15
United States v. *Board of Com'rs of Fremont County, Wyo.*, 145 F. 2d 329, certiorari denied 323 U.S. 804	16
United States v. *Eastman*, 118 F. 2d 421	23
United States v. *Equitable Trust Co.*, 283 U.S. 738	12, 26
United States v. *Gilbertson*, 111 F. 2d 978	26
United States v. *Goltra*, 312 U.S. 203	18
United States v. *Hellard*, 322 U.S. 363	15
United States v. *Hotel Co.*, 329 U.S. 585	18, 20
United States v. *Jones*, 131 U.S. 1	31
United States v. *New York Rayon Co.*, 329 U.S. 654	18
United States v. *Rickert*, 188 U.S. 432	16, 24
United States v. *Shaw*, 309 U.S. 495	11, 19
United States v. *Sherwood*, 312 U.S. 584	11, 18
United States v. *Smelser*, 87 F. 2d 799	30
United States v. *United States Fidelity Co.*, 309 U.S. 506	11, 18
United States, et al. v. *Preston, et al.*, No. 12,218	9, 21, 24
Utah Power & Light Co. v. *United States*, 243 U.S. 389	27
Western Fruit Growers v. United States, 124 F. 2d 381	30
Young v. *United States*, 176 Fed. 612	30

Statutes:

General Allotment Act of February 5, 1887, 24 Stat. 388, 389 25 U.S.C. secs. 331, 348	13, 14
Act of October 1, 1890, 26 Stat. 636, 637	20
Mission Indian Act of January 12, 1891, 26 Stat. 712	3, 4, 13, 14
Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U.S.C. sec. 345	2, 17
Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. sec. 349	14, 22
Act of June 21, 1906, 34 Stat 325, 327, 25 U.S.C. secs. 354, 410	14, 22, 28
Act of March 3, 1909, 35 Stat. 781, 784	21
Act of April 4, 1910, 36 Stat. 269, 272	21
Act of June 22, 1910, 36 Stat. 580, 581	20
Act of March 3, 1911, 36 Stat. 1058, 1061	21
Act of August 24, 1912, 37 Stat. 518, 520	21
Act of June 30, 1913, 38 Stat. 77, 80	21
Act of August 1, 1914, 38 Stat. 582, 585	21
Act of March 4, 1915, 38 Stat. 1228	21
Act of May 18, 1916, 39 Stat. 123, 126-127	21
Act of March 2, 1917, 39 Stat. 969, 972	21
Act of May 25, 1918, 40 Stat. 561, 566	21
Act of June 30, 1919, 41 Stat. 3, 7	21
Act of February 14, 1920, 41 Stat. 408, 412	21
Act of May 26, 1920, 41 Stat. 623, 625	20
Act of March 3, 1921, 41 Stat. 1225, 1229	21
Act of May 20, 1924, 43 Stat. 133, 134	20
Act of March 4, 1925, 43 Stat. 1302, 1311, 38 U.S.C. sec. 551	20
Act of April 12, 1926, 44 Stat. 240	29
Act of June 28, 1938, 52 Stat. 1209, 1211	20
Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 846, 28 U.S.C. sec. 2678	20
Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70(n)	20
25 U.S.C. secs. 2, 403	14

Miscellaneous:

33 Am. Juris., Liens, sec. 14, p. 425	17

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BRIEF FOR THE UNITED STATES AND LEE ARENAS

OPINION BELOW

The district court did not write an opinion. Its oral views are set forth in the record at pages 59-66, and its findings of fact and conclusions of law appear in the record at pages 40-48.

JURISDICTION

This suit was originally brought under the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 28

U. S. C. sec. 345,[1] to determine an Indian's right to certain allotments. After judgment was entered for the Indian, his attorneys filed a petition in the case for a supplemental decree making an allowance for attorneys' fees and expenses and impressing a lien upon the restricted allotments to secure payment thereof. For the reasons stated in the Argument, *infra,* pp. 13-31, it is believed that the district court had no jurisdiction to entertain the supplemental petition. Judgment granting the relief sought was entered May 3, 1948 (R. 53). Notice of appeal was filed by the United States on its own behalf and on behalf of the Indian on June 30, 1948 (R. 56).[2] The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

STATUTES INVOLVED

1. The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345, is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and

[1] The jurisdictional provisions of this Act were incorporated in the Judicial Code sec. 24(24), 28 U. S. C. sec. 41(24) which was identical in scope with the 1894 Act as amended. *First Moon* v. *White Tail,* 270 U. S. 243, 245 (1926). It is now sec. 1353 of Title 28, United States Code. For brevity, these provisions will be hereinafter referred to as the 1894 Act as amended.

[2] Notice of appeal on behalf of the Indian was also filed by a private attorney on June 2, 1948 (R. 54), and that appeal is also pending under the same docket number.

prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States are party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

2. Pertinent portions of the Mission Indian Act of January 12, 1891, 26 Stat. 712, and of the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, are set forth in the appendix, pp. 32-34, *infra*.

QUESTIONS PRESENTED

1. Whether in a proceeding under the 1894 Act, as amended, brought by an Indian to determine his right to allotments, the district court had jurisdiction to impress a lien upon the restricted allotments to secure payment of adjudged attorneys' fees and expenses in favor of the attorneys for the successful Indian litigant and to enforce such lien by appointing a receiver to collect the income from the property, by sale of the property, etc.; and

2. Whether the district court had jurisdiction to adjudicate any questions as to such attorneys' fees and expenses.

STATEMENT

As a result of litigation which culminated in this Court's decision in *United States* v. *Arenas,* 158 F. 2d 730 (1946), certiorari denied 331 U.S. 842, it was determined that Lee Arenas was entitled to allotments of certain lands in Palm Springs, California. Thereafter, the present judgment was entered awarding his attorneys some 22½% of the value of the allotments as fees and expenses, imposing a lien on the allotments to secure payment thereof and retaining jurisdiction to take further proceedings for the enforcement of such lien by appointment of a receiver or by other means.

The facts relating to the present controversy may be summarized as follows:

The allotted lands are part of the public lands which were originally set aside by a trust patent executed May 14, 1896, as a reservation for the Agua Caliente, or Palm Springs, Band of Mission Indians of California. The Mission Indian Act of January 12, 1891, 26 Stat. 712, contemplated that this reservation as well as others established for other Mission Indians would eventually be allotted in severalty to members of the bands (R. 23-25). Under Section 5 of the Act, *infra,* p. 32, upon approval of the individual allotments by the Secretary of the Interior, trust patents were to be issued in the name of the allottees. The allottees were not, however, authorized to sell or encumber the land, the Act providing that any conveyance of a trust allotment or contract touching the same, made prior to the issuance of the fee patent, would be absolutely null and void. The United States undertook to hold the lands in trust for the allottees for a period of twenty-five years and agreed to convey the lands at the end of that period "in fee, discharged of said trust and free of all charge and incumbrance whatsoever."

Allotments were made from time to time upon various Mission Indian Reservations and in 1923 a schedule of allotments on the Palm Springs or Agua Caliente Reservation was prepared by the allotting agent. This schedule was, however, disapproved by the Secretary of the Interior. Another schedule was prepared which was received by the Department of the Interior in 1927. No action was taken thereon until 1944.

Meanwhile, on December 24, 1940, pursuant to the Act of 1894, as amended, Lee Arenas instituted in the court below an action, *Lee Arenas* v. *United States,* No. 1321 O'C-Civil, for an adjudication of his claims to allotments listed on the 1923 or 1927 schedules on his own account and as the heir of his wife (Guadaloupe), his father (Francisco), and his brother (Simon) (R. 6, 164-165).

The Government's motion for summary judgment was granted on March 6, 1942, and on June 30, 1943, this Court affirmed on the basis of the decision in *St. Marie* v. *United States,* 108 F. 2d 876 (C.C.A. 9, 1940). *Arenas* v. *United States,* 137 F. 2d 199. The Supreme Court reversed (*Arenas* v. *United States,* 322 U.S. 419 (1944)), and upon the subsequent trial the district court found that Arenas was entitled to the allotments selected by himself and his deceased wife, father and brother, and that the trust patents should be effective as of June 21, 1923. *Arenas* v. *United States,* 60 F. Supp. 411 (S. D. Cal., 1945). At this time the district court reserved jurisdiction for the purpose of adjudicating the reasonable sums that should be allowed to his attorneys for services and expenses incurred in the prosecution of his claims (R. 13). On appeal, this Court modified the judgment with respect to Arenas' own allotment and that of his wife by making the effective date of the trust patents May 9, 1927, and reversed the judgment insofar as it found Arenas

entitled to the allotments selected by his father and brother. *United States* v. *Arenas,* 158 F. 2d 730 (C.C.A. 9, 1946), certiorari denied 331 U.S. 842 (1947).

On that appeal, the United States objected to the provision of the judgment which reserved jurisdiction for the purpose of determining sums to be allowed and paid as attorneys' fees and expenses and for the purpose of making appropriate orders for the securing and payment of such sums. As to this objection, this Court stated (158 F. 2d at p. 753):

> The appellant objects that "Presumably, it was intended that thereafter judgment would be entered against the United States for such expenses," and points out that the Act of 1894, supra, "by which the United States consented to this suit, does not authorize the imposition of liability for costs or other expenses of litigation against the Government."
>
> We agree entirely with the appellant's construction of the Act of 1894 [25 USCA § 345]. The difficulty with the appellant's argument, however, is that it has no application to the case at bar.
>
> The judgment of the court below seeks to impose no liability for any expenses of litigation upon any one, certainly not the United States. The appellant does not question the court's right to leave the case open for such future action as it may deem proper: the objection is that "presumably" the lower court is planning to mulct the Government for the appellee's attorneys' fees.
>
> There is neither internal nor external evidence that the judgment reflects any such intention, or any other unlawful or unfair intention. So far as the appellant is concerned, any objection to this paragraph of the judgment is not only premature,

but moot. For this reason, this Court refrains from making any ruling on the subject.

On October 24, 1947, appellees, attorneys for Arenas in the prosecution of his claims, filed in the allotment proceeding a petition for a supplemental decree for attorneys' fees, etc. (R. 2-12). The petition alleged the employment of appellees on a *quantum meruit* basis (R. 3) and the nonpayment for services rendered and for moneys advanced as expenses in the amount of $258.67 (R. 5-6). It also alleged that the lands involved had a value in excess of $1,000,000, and that, if properly managed, they should produce an annual income in excess of $20,000 instead of $7,500 as at present (R. 5, 9-10). In consideration of the work involved in prosecuting the claims as outlined in the petition (R. 6-9), it was alleged that 33-1/3 per cent of the value of the lands involved would be a reasonable fee (R. 10). Petitioners asked for an order requiring the United States and Arenas to show cause why the relief sought should not be granted. The relief requested was (1) that appellees have judgment against Arenas in an amount equal to 33-1/3 per cent of the land value as fees for services and in an additional amount for advances; (2) that a lien be impressed upon the lands involved to secure the amounts found due; (3) that a portion of the property sufficient to satisfy the judgment be sold, free from any restrictions upon alienation and that the balance of the proceeds of the sale, if any, be distributed to the plaintiff, or otherwise disposed of as the Court may direct, and (4) if the property be not ordered sold, a receiver be appointed to manage the property and to pay the net income to the plaintiff and to petitioners as the Court may direct.

Also on October 24, 1947, the district court issued an order, directed to Arenas alone, to show cause why

the prayers of the petition should not be granted (R. 13-14). On December 16, 1947, the United States, appearing specially, moved to dismiss the show cause order in so far as it and the underlying petition were directed toward the issuance of any order affecting in any way the restricted allotments or the management thereof, on the grounds that, since title to the lands was in the United States, it was an indispensable party and had not consented to such jurisdiction (R. 15-17). On December 31, 1947, this motion to dismiss was denied (R. 27). On February 9, 1948, the United States, appearing specially on its own behalf and generally on behalf of Arenas, filed an answer (R. 28-38), alleging its governmental interest in the enforcement of the restrictions against alienation of the allotments (R. 28-29), and praying that, if appellees were entitled to any relief, it be limited to a personal money judgment against Arenas (R. 37).

After trial (R. 39, 59-116), on March 31, 1948, the court announced its decision that appellee attorneys were entitled to fees for services rendered and to reimbursement for costs advanced, and that a lien would be impressed upon the allotments and proceeds therefrom as security (R. 64-66). The court reasoned that by the 1894 Act, as amended, the United States had consented to the exercise of full equitable jurisdiction, including a proceeding in the nature of a supplemental bill for the taxation of costs between solicitor and client, and that, having jurisdiction to render relief in the main action, i.e., the suit to determine entitlement to allotments, the court had jurisdiction to affect the allotted lands (R. 59-62, 66). On May 3, 1948, findings of fact and conclusions of law were filed (R. 40-48), in which it was found, among other things, that the value of the allotted lands was uncertain but, nevertheless, very substantial (R. 42). Also on May 3,

1948, judgment was entered (R.49-53). The judgment provided for recovery from Arenas of 22½ per cent of the value of the allotted lands as fees for services rendered and $258.67 as reimbursement for costs advanced (R. 50-51). It also provided that payment of the award would be secured by an equitable lien upon the allotments, including "the entire interest in said lands in the hands of the United States of America," and upon 22½ per cent of the income therefrom in excess of the reasonable operating expenses of the property (R. 51-52). Although the value of the award in money was unascertainable (R. 42), and hence could not be paid, Arenas was granted a period of three months to satisfy the lien during which time proceedings to enforce it would be stayed (R. 52). The court retained jurisdiction in order to determine the time when, manner in which, and method whereby, payment of the award might be made or further secured, to compel the satisfaction or enforcement of the lien, and, if necessary, to determine the money value of the services rendered and to appoint a receiver to effectuate the judgment (R. 53). This appeal followed (R. 56).[3]

The same questions are now pending before this Court in another case entitled *United States, et al.* v. *Preston, et al.,* No. 12,218. That case involves a similar award to attorneys who represented Eleuteria Brown Arenas in her successful suit to establish her right to an allotment. The judgment in that case, after

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[3] Lee Arenas has also appealed through private counsel (R. 54). That attorney, Mr. John J. Taheny, subsequently was replaced and by order of this Court entered December 15, 1948, pursuant to stipulation, Mr. Taheny's fees and expenses were fixed at $4,960.98, the order including a provision imposing a lien upon the interest of Lee Arenas in the allotted lands (R. 205-207). No notice of the stipulation or order was given to the United States prior to entry of the order.

awarding 12½ per cent of the value of the allotment and $100 expenses, imposed a lien on the property, ordered the premises sold and directed that the proceeds, after expenses of the sale, be divided between the attorneys and Eleuteria Brown Arenas.

SPECIFICATIONS OF ERRORS

The statement of points relied upon by the United States on its appeal (R. 57, 204) is as follows:

1. The court erred in denying the Government's motion to dismiss the petition and order to show cause.

2. The court erred in finding, concluding and adjudging that appellees were entitled to an equitable lien upon the restricted allotments involved and the income derived therefrom to secure the payment of attorneys' fees and moneys advanced as costs and expenses of suit, and in failing to find and conclude that it was without jurisdiction to impose such a lien.

3. The court erred in retaining jurisdiction in order to compel the satisfaction, discharge or enforcement of the equitable lien, and to appoint a receiver or commissioner to effectuate the judgment.

SUMMARY OF ARGUMENT

I

A. By various statutory enactments, designed to effectuate its policy of guardianship over Indians, Congress has clearly provided that trust allotments, such as those here involved, should be kept intact for the allottee until the termination of the trust and should in no way be used to satisfy debts of the allottee contracted prior to that time. Also, Congress provided that any attempted conveyance of the land would be absolutely null and void. Hence although the Indian is the beneficial owner, the United States is vitally interested in any proceedings which might affect the

property. In fact, in suits concerning the allotments, the interest of the United States predominates over that of the Indian owner.

B. In view of the governmental interest in the property, the imposition of a lien to secure payment of attorneys' fees constitutes an attempt to impose liability for such fees upon the United States. This Court in *United States* v. *Arenas,* 158 F. 2d 730 (1946), recognized that the imposition of such liability was not permitted by the 1894 Act. And, since public policy forbids the granting of liens upon public property in the absence of statutory authorization, it follows that the court below had no jurisdiction to impose a lien upon the restricted property.

C. The Act of 1894 was a consent of the United States to suit for the limited purposes stated in the statute and made no provision for adjudication of claims for attorney's fees. Since the statute constitutes a waiver of the sovereign immunity from suit the jurisdiction thereby granted cannot be enlarged by implication. *United States* v. *Sherwood,* 312 U.S. 584 (1941); *United States* v. *United States Fidelity Co.,* 309 U.S. 506 (1940); *United States* v. *Shaw,* 309 U.S. 495 (1940). Moreover, the assumption by the court below of such jurisdiction is contrary to the policy of Congress to make specific provision for the payment of attorney's fees when it deems the circumstances appropriate and, in doing so, to place monetary or other limitations thereon. While Congress has made provision for payment of certain costs in proceedings under the 1894 Act, it has expressly excluded attorney's fees therefrom.

D. Moreover, imposition and enforcement of the lien would directly contradict the express statutory provision and the policy of Congress with reference to the

restrictions upon the Indians and others in dealing with the property. In legislation enacted both prior to and subsequent to the 1894 Act and its amendment, Congress by specific provision applicable to every possible situation has required that the trust allotments should be preserved for the allottee until the end of the trust period and should not, in any way, be employed to pay debts contracted during that period. The result of imposition of the lien and enforcement thereof is to accomplish a sale of the property and to charge the proceeds not only with debts of the Indian but also with other charges such as the expenses of sale.

The 1894 Act rather than containing any release of these restrictions upon this property clearly indicates that it should be subject to those restrictions. Any implication from the 1894 Act that the guardianship of the United States has been abrogated and administration of the trust delegated to the courts is further denied by the strong policy of Congress to preserve these lands for the Indians. The courts have long recognized and enforced this policy, even to the extent of overriding equities which might otherwise exist in favor of persons dealing with the Indians. The proceedings in the court below which look to immediate and complete liquidation of the Indian lands solely for the purpose of assuring their attorneys of payment of the Indian's debt to them are in direct contradiction of this policy. Not the slightest attempt has been made to preserve the lands for the Indians, but instead the door has been opened for the dissipation of not only the allotments here involved, but also the allotment of any Indian who must seek the aid of the courts in obtaining recognition of his right thereto.

E. The decisions in *United States* v. *Equitable Trust Co.,* 283 U.S. 738 (1931), and *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C.C.A. 10, 1944), certiorari

denied 324 U.S. 844, do not support the assumption of jurisdiction by the trial court to impose a lien upon the restricted property. There is nothing in those cases to support the view that by the 1894 Act, wherein Congress authorized Indians to sue to establish their rights to trust allotments, the restrictions imposed for the benefit of the Indians were impliedly relinquished.

II

Since the district court's jurisdiction is strictly limited by the 1894 Act and since there was no fund in court from which payment of attorneys' fees could be enforced, it is apparent that the court was without power to adjudicate any questions as to attorneys' fees. The action under the 1894 Act was a special proceeding and the court was not thereby vested with its traditional general equity jurisdiction.

ARGUMENT

The District Court had no jurisdiction to impress a lien upon the trust patent allotments or to enforce such lien by appointing a receiver or ordering the sale of the property.

I

A. *Introductory—The interest of the United States.* —It is fundamental to an understanding of the issues in this case and the result of the decision below that the interest of the United States in relation to the property be clearly in mind. Because of the relationship between the United States and the Indians, the Government has control of their property. In authorizing the division of the tribal property in severalty, Congress imposed limitations upon the power of the individual to deal therewith. Under the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. sec. 331 and the Mission Indian Act of 1891, 26 Stat. 712, title to individual allotments is held in trust by the United States for the allottees. The management and

control of the property generally is vested in the Commissioner of Indian Affairs and the income from the property is subject to the control of the United States through the Secretary of the Interior, 25 U. S. C. secs. 2, 403. Section 5 of the Mission Indian Act, 26 Stat. 712, provides that upon expiration of the trust period, the United States will convey to the allottee or his heirs "discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." Section 5 of the General Allotment Act of February 5, 1887, 24 Stat. 388, 389, 25 U. S. C. sec. 348, contained like provision in almost identical language. In 1906 the General Allotment Act was amended so as to permit issuance of a fee patent during the trust period with the stipulation that "said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent". Act of May 8, 1906, 34 Stat. 182, 25 U. S. C. sec. 349. About a month later, by the Act of June 21, 1906, 34 Stat. 325, 327, 25 U. S. C. secs. 354 and 410, there was added to the General Allotment Act, the following provisions:

> No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.
>
> That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor during his minority, except with the approval and consent of the Secretary of the Interior.

Thus, Congress by unequivocal language and by provisions applicable to every possible situation provided that the trust allotments should be preserved for the allottee and should not, in any way, be employed to pay debts he contracts prior to receiving fee title.

These provisions are typical of the restrictions upon encumbrance or sale which Congress has imposed upon Indian property whenever it is allotted in severalty. As a result, even though the Indian is the beneficial owner, the United States is vitally interested in any proceedings affecting the property. This interest is the same whether the Indian has fee title subject to restrictions upon alienation or, as in the instant case, the United States holds title in trust for the Indian. As a result, the United States is interested in any proceeding affecting such property even to the extent that it may obtain cancellation of conveyances that have been made in violation of restrictions even though alienation was accomplished by judicial proceedings in which the Indian owning fee title was a party. *United States* v. *Hellard,* 322 U.S. 363, 366 (1944), and cases there cited. The Indian is, however, concluded by proceedings brought on his behalf by the United States. Thus, in the case of Indian allotments, the predominant interest is that of the United States in executing its policy of protecting the Indians against exploitation.

B. *The decision below cannot be reconciled with the decision of this Court on the previous appeal (United States* v. *Arenas, 158 F. 2d 730).*—Upon the previous appeal, the United States argued that attorneys' fees and expenses could not be awarded against the Government. With reference to this argument, this Court stated (*United States* v. *Arenas,* 158 F. 2d 730, 753): "We agree entirely with the appellant's construction of the Act of 1894 [25 U.S.C.A. § 345]." The fact

that the judgment in the instant case does not, in terms, impose liability for such expenses upon the United States but instead imposes a lien upon the property for such charges, does not distinguish the situation. As we have shown (*supra,* pp. 13-15), the United States has a direct and vital interest in the allotted land. Because of such interest, a suit seeking to condemn such land is a suit against the United States, since "A proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota* v. *United States,* 305 U.S. 382, 386 (1939). Likewise, an attempt to impose a lien for certain charges upon land in which the United States has an interest is an attempt to impose liability for those charges upon the United States. This is necessarily so since the only purpose of the lien is to coerce payment of the charges it secures. Similarly, lands which are held by the United States in trust for Indians are not subject to local taxation absence consent of Congress. *United States* v. *Board of Com'rs of Fremont County., Wyo.,* 145 F. 2d 329 (C.C.A. 10, 1944), certiorari denied 323 U.S. 804. In pointing out the reasons why this is so, the court said in *United States* v. *Rickert,* 188 U.S. 432, 438 (1903):

> To say that these lands may be assessed and taxed by the county of Roberts under the authority of the State, is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances.

It is thus clear that imposition of a lien for attorneys' fees would constitute the imposition of liability for such fees upon the United States—a result which this

Court has recognized is not permitted by the 1894 Act. Indeed, because public property is held for public uses and because the means of securing payment of governmental obligations are specifically provided for, it is generally stated that "The granting of liens on public property is against public policy. In fact public policy forbids a lien on public property. Accordingly, in the absence of statutory authorization, no lien can be acquired on property of the Government of the United States, or on property of a state or local governmental authority." 33 Am. Juris., Liens, sec. 14, p. 425. Moreover, equitable liens to secure the payment of attorney's fees can under any view "cover only the interest of the client in the property charged, and are subject to any rights in the property which are valid against the lien at the time the lien attaches." *In Re Gillaspie,* 190 Fed. 88, 91 (N.D. W. Va., 1911). Since the United States has an indivisible interest in the entire property, it follows that a lien could not be enforced without affecting the interest of the United States, and hence it may not be imposed on the property.

C. *The United States in the 1894 Act as amended did not consent to imposition of a lien upon the property to secure payment of attorneys' fees.*—In the 1894 Act Congress provided a means whereby an Indian could litigate his right to an allotment of land. However, Congress did not waive the governmental immunity from suit in respect to all aspects of the restricted allotment. On the contrary, the Act simply authorizes suit to establish the Indian's right to an allotment.[4] It expressly provides that the parties "shall be the claimant as plaintiff and the United States as party defend-

[4] We are not here concerned with the other aspect of the Act relating to suits by the Indian to protect his interest in lands that have been allotted to him. *Gerard* v. *United States,* 167 F. 2d 951 (C. C. A. 9, 1948).

ant". The nature of the judgment to be entered is likewise defined in the provision that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him." Thus, the Act strictly limits the nature of the suit, the parties thereto and the judgment to be entered. A claim for attorneys' fees against the Indian plaintiff and imposition of a lien upon the allotment to secure payment thereof is clearly not within the terms of the Act.

Nor may such jurisdiction be implied. This statute is a waiver of the sovereign immunity from suit, and hence the jurisdiction thereby granted cannot be enlarged beyond the express terms of the Act. *United States* v. *New York Rayon Co.,* 329 U. S. 654, 659 (1947); *United States* v. *Hotel Co.,* 329 U. S. 585, 590 (1947); *United States* v. *Sherwood,* 312 U. S. 584, 590 (1941); *United States* v. *Goltra,* 312 U. S. 203, 210 (1941); *United States* v. *United States Fidelty Co.,* 309 U. S. 506 (1940). The *Sherwood* case is particularly apt here. The court there held that the creditor of a claimant against the United States could not prosecute a claim under the Tucker Act, joining the United States and his debtor as defendants, pointing out that (312 U. S. at p. 586) "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit" and (312 U. S. at p. 591) "that consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government." The 1894 Act presents a much clearer situation in view of the express provision that the parties shall be "the claimant as plaintiff and the United States

as party defendant". Clearly, it did not embrace claims by white men against the Indian plaintiff.

Although recognizing that consent should be strictly construed, the court below stated that "once given that consent is to be liberally construed to effectuate that purpose" (R. 60). For this view, it cited *United States* v. *Shaw,* 309 U. S. 495 (1940), apparently meaning the language at page 501 that:

> Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed.

That the court below misconceived the effect of the *Shaw* decision is apparent from the fact that on the page following the above-quoted matter, the Supreme Court reiterated the rule of strict construction, stating (p. 502):[5]

> It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress.

The view of the court below that jurisdiction of claims for attorneys' fees to be paid out of the allotted land was necessarily granted in order to effectuate the purpose of the statute was presumably based on the idea that, absent such jurisdiction, the Indians could not secure attorneys (R. 60, 116). But such a question is a matter of policy to be addressed to Congress and does not warrant enlargement of the consent beyond

[5] It is obvious from the complete context of the *Shaw* decision and the cases cited (*Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381 (1939), and *Federal Housing Administration* v. *Burr,* 309 U. S. 242 (1940)) that, in the extract of the opinion relied upon by the court below, the court was referring to the fact that when, in the case of Government corporations, a general consent to sue and be sued has been given, limitations thereon will not be implied. See *Reconstruction Finance Corp.* v. *Menihan Corp.,* 312 U. S. 81 (1941).

its terms. Cf. *Arenas* v. *United States,* 322 U.S. 419, 432 (1944). Where Congress has believed that provision for payment of attorneys should be made, the consent statute has contained explicit provision therefor. See e.g., Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70(n); Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 846, 28 U.S.C. sec. 2678; Act of March 4, 1925, 43 Stat. 1302, 1311, 38 U.S.C. sec. 551 (World War Veterans' Act); Act of May 20, 1924, 43 Stat. 133, 134. More important, Congress does not simply authorize the payment to attorneys of any amount which the court may determine. On the contrary, particularly in cases relating to Indian claims, the maximum amount which a court may award to attorneys has been strictly limited, usually to 10 per cent of the amount recovered. Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70(n); Act of October 1, 1890, 26 Stat. 636, 637; Act of June 22, 1910, 36 Stat. 580, 581; Act of May 26, 1920, 41 Stat. 623, 625; Act of June 28, 1938, 52 Stat. 1209, 1211; Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 846, 28 U.S.C. sec. 2678; World War Veterans Act of March 4, 1925, 43 Stat. 1302, 1311, 38 U.S.C. sec. 551. With this background, it is clear that if Congress had intended that attorney's fees should be guaranteed it would have made some specific provision therefor in the 1894 Act with such limitations as it deemed appropriate for protection of the Indians. "* * * it would have been easy to have said so in express terms." *United States* v. *Hotel Co.,* 329 U.S. 585, 590 (1947).

Indeed, the policy of Congress with respect to suits under the 1894 Act is apparent from the fact that from 1909 to 1921 specific appropriations were made for the payment of court costs, witness fees and other expenses "incurred in suits instituted in behalf of or against

Indians involving lands allotted to them" but it was expressly provided "that no part of this appropriation shall be used in the payment of attorney's fees". Act of March 3, 1909, 35 Stat. 781, 784.[6] Thus, Congress, while recognizing that the policy of the Act required it should make provision for the payment of certain litigation expenses of the Indians, excluded attorney's fees. Plainly, the court below was not warranted in concluding that such a necessity for guaranteeing attorneys' fees existed so as to require an implication of jurisdiction to award such fees.

D. *The decision below is in direct contradiction to the limitations imposed by Congress upon alienation of the property.*—In the instant case, the judgment purports to impose a lien upon the restricted allotment and reserves jurisdiction to make orders for enforcement thereof. In *United States, et al.* v. *Preston, et al.*, No. 12,218, now pending in this Court, such enforcement proceedings have taken the form of a direction that the property be sold, a deed to be executed by the Commissioner appointed to conduct the sale and his expenses to be deducted from the proceeds thereof. Such relief was requested in the instant case by the appellees (R. 12), who also requested appointment of a receiver to collect the income. Thus, the power asserted is to sell the property; to charge it not only with an obligation of the Indian, but also for other charges such as the expenses of sale; to physically seize the property by means of a receiver and to dispose of its

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[6] See also the Acts of April 4, 1910, 36 Stat. 269, 272; March 3, 1911, 36 Stat. 1058, 1061; August 24, 1912, 37 Stat. 518, 520; June 30, 1913, 38 Stat. 77, 80; August 1, 1914, 38 Stat. 582, 585; March 4, 1915, 38 Stat. 1228; May 18, 1916, 39 Stat. 123, 126-127; March 2, 1917, 39 Stat. 969, 972; May 25, 1918, 40 Stat. 561, 566; June 30, 1919, 41 Stat. 3, 7; February 14, 1920, 41 Stat. 408, 412; March 3, 1921, 41 Stat. 1225, 1229.

income. The existence of such a power is denied by the express provisions applicable to this land pursuant to the general policy of Congress. The land cannot be liable "to the satisfaction of any debt contracted prior to the issuing the final patent in fee therefor". Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. sec. 354; see also Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. 349, *supra,* p. 14. Nor may any money accruing from the lease of such property be used for such purpose without the consent of the Secretary of the Interior. Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. sec. 410. Both the Mission Indian Act and the General Allotment Act provide that any attempted conveyance "shall be absolutely null and void" (see *supra,* p. 14). And it is obvious that if the actions of the court below were sustained, the United States could not perform its promise to convey this land to Lee Arenas at the end of the trust period "free of all charge or incumbrance whatsoever" (see *supra,* pp. 14, 15-16). A clearer case of conflict with specific congressional prohibitions cannot be imagined.

The only possible justification for the assertion of the powers assumed by the court below would be that the 1894 Act has effected a release of all such statutory limitations upon the allotments and has transferred to the court complete power to administer the trust as to these particular lands. There is, of course, no language in the 1894 Act indicating such an intent. Plainly, such a result cannot be implied simply from the fact that the Act authorized the Indians to bring suit against the United States.

The implication found by the district court is denied by the express provision of the 1894 Act. The result reached is that whenever any Indian brings suit, rather than simply receiving his patent from the Secretary of the Interior, the restrictions are inoperative. But,

since the Act provides that the judgment shall have the same effect as if the allotment had been approved by the Secretary, it is clear that the same restrictions apply in both cases. And even if the Act were less specific, the implication would not be permissible because the statute constitutes a waiver of governmental immunity, and hence may not be enlarged by implication beyond its plain language (see *supra,* pp. 17-21). In this connection it should be noted that this Court has recognized that the 1894 Act did not vest in the courts a power to review generally the actions of the United States in executing its guardianship over the Indians. In rejecting such a construction in *United States* v. *Eastman,* 118 F. 2d 421, 423 (C.C.A. 9, 1941), it was stated:

> It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed.

See also *Arenas* v. *United States,* 322 U.S. 419, 432 (1944).

More important, however, is the fact that the decision below flies in the face of the fundamental policy established by Congress in dealing with its Indian wards. The policy was asserted by Congress both before and after the 1894 Act in the most explicit terms and has been rigorously enforced by the courts. *Heck-*

man v. *United States,* 224 U.S. 413 (1912); *United States* v. *Rickert,* 188 U.S. 432, 437-438 (1903); *Monson* v. *Simonson,* 231 U.S. 341, 345-347 (1913). The cornerstone of this policy is that the land allotted to the Indian shall be preserved until he is capable of its management and control and the trust is terminated. See *Monson* v. *Simonson,* 231 U.S. 341, 345 (1913). This policy is so strong that it overrides the usual equitable provisions between private parties. For example, while a return of the proceeds is ordinarily required as a prerequisite to cancellation of an unauthorized sale or mortgage, no such requirement applies when the restrictions upon Indian lands have been violated, because to do so would "frustrate the policy of the statute." *Heckman* v. *United States,* 224 U.S. 413, 447 (1912). Again the ordinary rule that a conveyance with warranty estops the grantor when he afterwards acquires the land does not apply when an Indian conveys while restrictions are in force. *Starr* v. *Long Jim,* 227 U.S. 613, 625 (1913). Similarly, doctrines of estoppel, ratification or laches cannot be applied so as to thwart this public policy. *American Surety Co.* v. *United States,* 112 F. 2d 903 (C.C.A. 10, 1940). It is absurd to suppose that Congress by the 1894 Act intended to abandon its guardianship as to any Indian who should bring suit under the Act, thus permitting the Indian to secure a release of restrictions contrary to the policy of protecting the Indian against his own improvidence or the impositions of others. There certainly was no intention that, as in cases like the Palm Springs Reservation where many Indians brought suit, substantially all of the lands should immediately pass to other ownership by means of judicial sales to satisfy attorney's fees or other charges.

The actions taken by the district court in this case and the companion case of *United States* v. *Preston,*

No. 12,218, show conclusively that this strong policy of Congress has been completely ignored and no attempt has been made to preserve the allotment for the Indians. The judgment determines the amount of fees payable only as a percentage of the unascertained value of the land and hence the amount of money needed to satisfy it does not appear. Since the amount is not determined there is, of course, no showing that Arenas is unable to pay it. Again, there is no showing that the property will be dissipated or wasted. In the companion case the court has simply ordered a sale of the entire allotment of the Indians. No attempt was made to work out some solution whereby the fees could be paid within a reasonable period of time from income from the property or otherwise without requiring its sale. Finally, although the allotments embrace three separate and distinct types of land, no effort was made to sell just enough land to pay the fees but rather the court ordered sale of all the lands allotted to Eleuteria Brown Arenas. These actions all demonstrate that not the slightest consideration has been given to the policy that these lands should be preserved for the Indian, but rather the sole consideration seems to have been that the attorneys shall receive their fees immediately. A clearer case of thwarting the policy of Congress could hardly be imagined.

Finally, it should be noted that not only does the judgment below award Lee Arenas' former attorneys 22½% of the allotment, but his first attorney upon this appeal was awarded $4960.98, which was made a lien upon the allotment, and undoubtedly his present attorney will likewise claim a similar right. Thus, the allotment is rapidly being dissipated and, in view of the losses which necessarily accompany a forced sale of property, it is evident that the prime purpose of the restrictions will be frustrated. Once the door is open,

it is not improbable that within a short time all of the Indians' lands will be gone and the United States will again have to make some provision for them.

It is inconceivable that Congress could have intended such a result in enacting a statute which was obviously designed to benefit the Indians. The fact that unrestricted property of the Indian might be available for payment of attorney's fees and the fact that the Secretary of the Interior might use some of the proceeds from the allotment for such purpose would seem to constitute adequate provision for their payment. Certainly appellees are entitled to no more, since, in view of the restrictions upon the allotment, they had ample notice that the allotments could not be used for such purposes. In this connection it should be noted that enforcement of the restrictions for the benefit of the Indians often produces hardships upon persons unaware of the restrictions (see *supra,* p. 24). As the court said in *United States* v. *Gilbertson,* 111 F. 2d 978, 980 (C.C.A. 7, 1940):

> In view of the body of authority thus outlined above, it appears that the undoubted equities of appellees who paid full consideration for the land twenty-three years ago and have since made improvements upon it in total ignorance of the extension of restrictions against its alienation, may not prevail in this action by the Government to restore to its Indian wards the land allotted to their grandfather.

E. *The cases relied upon by the court below do not support its assumption of jurisdiction in the instant case.*—The court below relied upon *United States* v. *Equitable Trust Co.,* 283 U.S. 738 (1931), and *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C.C.A.

10, 1944), certiorari denied 324 U.S. 844.[7] Neither of these cases involved the scope of jurisdiction in an original suit against the United States, but in both the United States was in the position of a plaintiff seeking relief. This distinction is basic. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134 (1938). As has been shown, in a suit against the United States the court's power is strictly limited by the jurisdictional statute. However, when the United States invokes the jurisdiction of a court as plaintiff, it is, with exceptions growing out of consideration of public policy, subject to the same rules of law as apply to individuals and, again with the possibility of exceptions, must be ready to do equity. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134-135 (1938); *McKnight* v. *United States,* 98 U.S. 179, 186 (1878); *Brent* v. *Bank of Washington,* 10 Pet. 596, 614-615 (1836). Cf. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409 (1917); *Causey* v. *United States,* 240 U.S. 399, 402 (1916); *Heckman* v. *United States,* 224 U.S. 413, 446-447 (1912).

In addition, the power of an equity court to make an allowance for attorney fees depends upon there being within the control of the court a fund from which payment might be made. In the *Equitable Trust* and *Anglin & Stevenson* cases there was such a

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[7] The court also referred to *Sprague* v. *Ticonic Bank,* 307 U.S. 161 (1939), for a general discussion as to the power of an equity court to tax costs between attorney and client (R. 60-61). However, the court recognized that this was not a *Ticonic Bank* case (R. 61), since that case involved contribution for expenses of litigation from others who would benefit from a common fund established by the successful plaintiff. The Government on this appeal does not seek to impeach the *Ticonic Bank* case, but, as does the court below, thinks it of little weight here, and further considers it distinguishable at least on the same grounds as the *Equitable Trust* and *Anglin & Stevenson* cases.

fund available, i.e., moneys which could be expended only with the approval of the Secretary of the Interior but which nonetheless could be used to pay debts of the Indian, including the expenses of the litigation from which he benefited. Thus, the question in those cases was whether under the circumstances there presented, the approval of the Secretary of the Interior was necessary before the funds could be so used. In the instant case, there is not such a fund. The restricted allotments cannot be so treated because they cannot become liable to the satisfaction of debts (Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. sec. 354, *supra* p. 14), and, therefore, cannot be used for payment of attorneys' fees. The allotments cannot in any sense be considered to be within the court's jurisdiction for such purposes, since the 1894 Act conferred jurisdiction only to determine the claim to an allotment and then to certify its judgment to the Secretary of the Interior. The land itself was not placed in the custody or control of the court. Cf. *Hoffman* v. *McClelland,* 264 U.S. 552, 558-559 (1924).

Neither the *Equitable Trust* nor *Anglin & Stevenson* cases involved an attempt to imply a release of all restrictions from an act similar to the 1894 Act. In the *Equitable Trust* case it was concluded that payment of attorney's fees would not violate the restrictions upon Indian property because the United States had consented to the payment of such fees. That proceeding had been originally commenced by suit in the name of Barnett by his next friend to recover funds which were physically possessed by the defendants. As the court pointed out (283 U.S. at p. 745), the intervention of the United States was not to supplant the next friend and was in recognition of a right to deduct reasonable expenses of the litigation. No such circumstances are presented here.

Similarly, in the *Anglin & Stevenson* case the court found a consent of the United States in two circumstances; first, the fact that under the Act there involved, Act of April 12, 1926, 44 Stat. 240, the judgment bound the United States "to the same extent as though no Indian lands were involved"; and second, that the United States had invoked the jurisdiction of the court to determine the heirs of Jackson Barnett. See *Anglin & Stevenson* v. *United States,* 160 F. 2d 670 (C.C.A. 10, 1947), certiorari denied 331 U.S. 834 (1947), which shows that even when governmental consent has been given the result is not the same in all particulars as it would be between private parties.

Indeed, the *Anglin & Stevenson* cases support the Government's view in the instant case that the award of attorney's fees is "a judgment against the United States" (160 F. 2d at p. 673), and hence can only be justified if Congress has expressly consented to such a judgment. As this Court has already held and as we have heretofore demonstrated, no such consent can be found in the 1894 Act.

II.

The District Court had no jurisdiction to entertain a petition for allowance of attorneys' fees under the Act of 1894 as amended.

It does not appear that there are present grounds of federal jurisdiction such as diversity of citizenship, etc., so that the court below would have jurisdiction of an independent action brought by appellees against Lee Arenas. Thus, the only possible basis for jurisdiction of the federal district court in the instant case is the 1894 Act as amended. The court below reasoned that the Act constituted a consent of the United States to the invocation of general equity jurisdiction including the authority to tax costs between solicitor and client (R. 59-60).

We have demonstrated in point I that such reasoning is erroneous in that the United States has not consented to the imposition of a lien upon the allotment to secure payment of such fees nor to enforcement of such lien by sale or otherwise. For the same reasons, it is clear that the 1894 Act did not vest in the court jurisdiction to make any adjudication concerning attorneys' fees. As we have shown (*supra,* pp. 17-21), the statute makes no mention of attorneys' fees and cannot be extended by implication to cover such matters since it must be narrowly construed. And since there was no fund in court which could be applied to the payment of attorneys' fees (*supra,* pp. 27-28) there is no occasion for invoking the principle that once equity has jurisdiction of the parties and the subject matter it will settle all disputes between the parties. Moreover, the 1894 Act created an entirely new form of proceeding which did not therefore exist either as common law or equity jurisdiction. *Young* v. *United States,* 176 Fed. 612, 614 (C.C. W.D. Okla., 1910). Such statutory actions are generally referred to as "special proceedings", and the statutory remedy can be invoked only to the extent and in the manner prescribed by the legislature. *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U.S. 481, 490 (1912); *United States* v. *Smelser,* 87 F. 2d 799, 801 (C.C.A. 5, 1937); *Western Fruit Growers* v. *United States,* 124 F. 2d 381, 387 (C.C.A. 9, 1941). The special nature of a proceeding under the 1894 Act is apparent not only from the limitations as to the parties and subject matter (see *supra,* pp. 17, 18) but also from the nature of the judgment to be entered. The court is not empowered to quiet title to the land or to issue a patent to the plaintiff. Its judgment simply establishes the right to an allotment "the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and

approved by him." Thus, rather than vesting in the court general equity jurisdiction to make a judgment transferring title to the land, the Act merely permits the court to determine the right to an allotment leaving it to the Secretary to issue the patent. *Hy-Yu-Tse-Mil-Kin* v. *Smith,* 194 U.S. 401, 413-414 (1904). The 1894 Act does not, therefore, vest in the court general equitable jurisdiction over the subject matter. Even when, as in the Tucker Act, courts are given jurisdiction over claims based upon equitable or maritime principles as well as upon legal demands, the courts have no jurisdiction to apply equitable remedies such as specific performance. *United States* v. *Jones,* 131 *U.S.* 1 (1889).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed with directions to dismiss the petition for allowance of attorney fees.

Respectfully,

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May 1949

APPENDIX

Section 5 of the Mission Indian Act of January 12, 1891, 26 Stat. 712, 713, provides as follows:

> That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, 25 U.S.C. 348, provides:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such

allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

Section 6 of the General Allotment Act as amended by the Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. sec. 349, provides:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law * * * *Provided,* That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: * * *

The Act of June 11, 1906, 34 Stat. 325, 327, 25 U.S.C. secs. 354 and 410, adds the following provisions to the General Allotment Act:

> No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.
>
> That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

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No. 12046

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

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vs.

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Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

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TOPICAL INDEX

PAGE

Statement of jurisdiction 1

Statement of the case 2

Argument 3

I.

The evidence supports the finding that the original contract for attorneys' fees of ten per cent (10%) was superseded, on or about September 7, 1943, by a contract for fees upon a quantum meruit basis 3

II.

The finding that petitioner John W. Preston is entitled to an attorney's fee of 12½% of the value of the property allotted to Lee Arenas is supported by the evidence; and the amount awarded is not excessive 10

Conclusion 19

TABLE OF AUTHORITIES CITED

Case	Page
United States v. Anglin & Stevenson, 145 F. 2d 622	17

Statutes	
United States Code Annotated, Title 25, Sec. 345	1
United States Code Annotated, Title 28, Sec. 225(a)	1

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Appellees.

APPELLEES' BRIEF IN REPLY TO BRIEF OF LEE ARENAS.

Statement of Jurisdiction.

The District Court had jurisdiction of the parties and subject-matter under Title 25, U. S. C. A., Section 345. This Court has jurisdiction upon appeal under Title 28, U. S. C. A., Section 225(a).

Statement of the Case.

Lee Arenas has appealed from the judgment of the District Court awarding attorneys' fees and expenses of suit to his attorneys, John W. Preston, Oliver O. Clark and David D. Sallee, as follows: To John W. Preston, twelve and one-half per cent (12½%), and to Oliver O. Clark and David D. Sallee, ten per cent (10%) of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas. [R. pp. 49-53, 54.]

Lee Arenas assigns two alleged errors of the District Court in rendering judgment, namely:

(1) That the finding that the contract for fees dated November 20, 1940, was superseded and rescinded is not supported by the evidence, hence judgment should have been for a total of ten per cent to all three attorneys; and

(2) That, even if said contract was not superseded or rescinded, the finding that John W. Preston is entitled to a fee of twelve and one-half per cent (12½%) is not supported by the evidence, and hence said fee is excessive.

A casual examination of the record shows that there is no merit in either assignment of error. The evidence quoted in appellant Arenas' brief (Br. pp. 4-13) is only part of the evidence in the case. Other evidence not referred to by said appellant amply supports both of the assailed findings.

ARGUMENT.

I.

The Evidence Supports the Finding That the Original Contract for Attorneys' Fees of Ten Per Cent (10%) Was Superseded, on or About September 7, 1943, by a Contract for Fees Upon a Quantum Meruit Basis.

The original contract between Lee Arenas and David D. Sallee provided for an attorney's fee of 10% of the allotted lands, or the value thereof. That proved to be insufficient. On or about September 7, 1943, after adverse judgment in the District Court, and affirmance thereof by this Court —it became necessary to file a petition for certiorari in the Supreme Court of the United States in order to secure a review of said adverse judgment. A *quantum meruit* contract was then entered into by Lee Arenas and Messrs. Preston, Clark and Sallee. [Petitioners' Exhibit No. 7, R. pp. 187-188.] The particular language of that contract here pertinent is:

> "I (meaning Lee Arenas) hereby agreeing to pay my said attorneys upon a quantum meruit basis for services rendered, and to advance or reimburse any and all expenses incurred in my behalf or in behalf of any and all members of my family." [R. p. 187.]

Lee Arenas testified in respect to the execution of the *quantum meruit* contract as follows [R. pp. 86-87]:

> "Q. Let's see that paper. Have you got it here? I show you this Petitioners' Exhibit No. 7 and call your attention to the word 'Lee' and to the word 'Arenas.' Didn't you make that mark on there? A. I don't know. Maybe I did.
>
> Q. What? A. Maybe I did.

Q. Maybe you did. Well, don't you know whether you did or not? A. I don't know.

Q. You don't know. Don't that look like your handwriting? A. I guess.

Q. How long would it take you to sign your name now? A. About—it would take quite a while.

Q. What would we have to do to get you ready to sign it? Would you have to have a chair and a table? A. Oh, right here I can sign it; yes.

Q. Right here you can sign it. Well, give us a piece of paper, Mr. Clerk. Do you want a pen? A. Oh, anything will be all right.

Q. Well, I guess this was written in pen. How would you like to write it with Preston's pen? It won't cost you a cent. A. All right.

Q. Now, write 'Lee Arenas.' A. Right here, huh?

Q. Right anywhere. Do you write with your left hand? A. I have to because this hand is no good.

Q. This hand is no good? A. No.

Q. Ordinarily you write with your other one, do you? A. Oh, when it is good; yes.

(Witness marking on paper.)

Mr. Preston: All right. We submit that and offer that in evidence as part of the cross-examination of this witness.

The Court: The examplar is received into evidence as Petitioners' Exhibit.

The Clerk: 18, your Honor."

Other testimony of Lee Arenas [R. pp. 88-89] shows that he was aware of the course of the litigation, something of the difficulties thereof, and of the work being done by petitioners, especially Judge Preston.

Marian Therese Arenas, wife of Lee Arenas, testified that he signed the *quantum meruit* contract, as follows [R. p. 91]:

> "Q. Now, I will show you a document which is in the same form, apparently a mimeographed copy of the previous one, except that it has the name of 'Lee Arenas' filled in and purports to be signed by him on the same date. This one is referred to as Petitioners' Exhibit No. 7. I will ask you whether you remember or whether you were present at the time that document was signed? A. Yes; I was.
>
> Mr. Preston: What is the answer?
>
> Mr. Taheny: She says I was, yes.
>
> Q. Do you recognize that as the signature of Lee Arenas? A. With his right hand; yes.
>
> Q. With his right hand? A. Yes."

It is true that Marian Therese Arenas says she thought the contract she signed [Exhibit No. 8] related to legal services in the ejectment suits brought by the Government. [R. pp. 94-95.] But, it is obvious that she is mistaken, as is shown by her subsequent testimony. [Cross-examination, R. pp. 95-99.] Moreover, her contract [Exhibit No. 8] shows on its face that the employment of petitioners by her was "in respect to all rights, including our *allotments*, which I have selected as the head of the family for myself and my children, and to protect us in the use and occupancy of the same." [R. p. 189.]

We think there is little, if any, doubt from the testimony of Lee and Marian Arenas that they signed, and knew they were signing, a fee contract on a *quantum meruit* basis. But, if their testimony leaves the matter in doubt,

that doubt is completely set at rest by the testimony of Messrs. Clark and Sallee.

Mr. Sallee testified in respect to the signing of the *quantum meruit* contract as follows [R. pp. 138-139]:

"Q. Now, what conversation did you have with Lee, that you have just referred to, shortly before he and his present wife signed the documents which bear the date February 1, 1945, respecting the reasons for the execution of such documents? A. Most of that conversation was conducted by Mr. Clark and Mr. Arenas after I had opened the question.

Q. Mr. Clark was present? A. Yes.

Q. Where was the conversation? A. We had several, some in my office, and I think one or two in Palm Springs.

Q. And in every instance was the present Mrs. Arenas present? A. I can't swear to that—I can't say whether she was in on all of them at Palm Springs. Some times I would see Lee and she wouldn't be at home, but in my office she was there.

Q. I assume, Mr. Sallee, that Lee Arenas wouldn't know what quantum meruit meant? Or did you tell him? A. Yes I did. And so did Mr. Clark.

Q. What did you tell him? A. The reasonable value for services—that the Court would set the fees accordingly.

Q. I don't like to lead an attorney, but— A. I am a poor witness, I know.

Q. As a part of that conversation, did you tell him that it was the considered opinion of you gentlemen, in view of what had been done and was needed to be done, that ten per cent would not be a reasonable fee? A. Correct.

Q. Did you tell him what would be a reasonable percentage? A. I did not.

Q. Did Mr. Clark? A. Not in specific figures, no.

Q. Did Mr. Arenas or his wife ask? A. No."

Mr. Clark testified in respect to the *quantum meruit* contract as follows [R. pp. 148-150]:

"Q. Will you briefly state the gist of these conversations leading up to the new agreement? A. When it became necessary to petition the United States Supreme Court, I went to Palm Springs and talked with Lee. I told him that it would be necessary for me and Dave to go to Washington and be admitted to the Supreme Court before we could file a petition for certiorari, but that I felt, in view of the importance of the litigation and its then condition, that it would be very much to his advantage to employ another lawyer who had had experience in practice in the United States Supreme Court, and that I had spoken to Judge Preston, who had formerly served in the State Supreme Court on the bench and who had also served the Government in several important capacities, and that I had come to recommend to him that Judge Preston be employed in association with Dave and myself for the purpose of the petition to the United States Supreme Court and the conduct of the case thereafter if we won in that court. I told him that this would, of course, mean the payment of additional compensation to the lawyers, and that I had not discussed with Judge Preston what his fee would be, but if the plan met with Lee's approval I would do that and talk with him further. Lee told me that he would be very glad for that to be done and for me to go ahead. I then returned to Los

Angeles and presented the matter in detail to Judge Preston, and as I recall, a period of at least two weeks elapsed, because Judge Preston was rather reluctant to engage in the litigation, but I continued to press the matter. He made a trip to the North and upon his return called me and said that he would be willing to be associated in the case. I then contacted Lee Arenas. It is my impression that Dave had called him to Dave's office and that Dave was present on this occasion. At the time I made this report I told Lee that Judge Preston had agreed to the association and that it would be necessary to prepare an additional contract covering our compensation, but that we were so busy in doing the things that had to be done in the case because we were working under a time limit, that I would not undertake to prepare that contract until other things had been attended to, but that when I did prepare the contract it would be upon the basis of a reasonable fee for the work done, having in mind what should be accomplished in event we won it, and the fee to be fixed by the United States District Court here, and I explained that to him in detail as to how it was fair, I thought, to us and fair to him, so that the Court knew exactly what the picture was and the Court then could say what was a reasonable fee to us and what was reasonable for Lee to pay. He told me it was perfectly fair and to go ahead and let him know when I wanted the new contract signed. The matter went on for a long time before I got around to the drafting of the contract with Dave, and then it eventuated into the signing of the later and last contract. When that contract was signed I read it to Lee and explained it to him, reminded him of the conversation that we had had before in reference to

it, and Lee in substance said it was acceptable to him, and it was signed.

Q. When you contacted Judge Preston did you relate to Judge Preston, in substance, the representations and statements that you had made to Mr. Arenas, such as you have just stated? A. I did relate to Judge Preston what I had said to Lee, and I had contacted Judge Preston before I suggested him to Lee.

Q. Before Judge Preston accepted employment you related to him, in substance, the statements you have just related? A. I did.

Q. Did you also disclose to Judge Preston the text of the agreement of November 20, 1940? A. My recollection is that I brought a copy to Judge Preston's office.

Q. And left it with him, before Judge Preston entered into the employment of the case? A. Yes."

It thus appears that Lee Arenas signed the *quantum meruit* contract; that before signing it, the meaning of *"quantum meruit"* was explained to him by Mr. Clark in Mr. Sallee's presence; and that Lee Arenas understood what he was signing, and was willing for the court to fix a reasonable fee, or fees, for his attorneys based upon work done and results accomplished.

The finding attacked as insufficient [Finding No. II, R. pp. 41-42] is fully supported by the evidence of Lee Arenas, Marian Therese Arenas, Oliver O. Clark and David D. Sallee.

II.

The Finding That Petitioner John W. Preston Is Entitled to an Attorney's Fee of 12½% of the Value of the Property Allotted to Lee Arenas Is Supported by the Evidence; and the Amount Awarded Is Not Excessive.

The record shows the large amount of work done by petitioner John W. Preston, and by Messrs. Clark and Sallee, the skill required to do said work, and the value thereof. [See especially, Petitioners' Exhibit No. 4A, entitled "Statement of Facts," R. pp. 163-173, where the course of the litigation, work done, *et cetera,* are set forth in detail.]

Appellant's brief completely ignores this statement. It also fails to state adequately the testimony concerning the value of the services rendered to Arenas by the petitioner. Indeed, it fails to even mention the testimony of Mr. L. F. Martineau, Jr., and only sketchily refers to the testimony of Mr. T. B. Cosgrove, both of whom are able and respected members of the California Bar.

Mr. L. F. Martineau, Jr., testified in respect to the value of petitioners' services in behalf of Lee Arenas in this litigation [R. pp. 68, 69, 70] as follows:

> "Q. I see; well, Mr. Martineau, taking into consideration the nature of the questions of law involved in this case, as disclosed by your examination of the record on file herein, and taking into consideration the work performed by petitioners, as disclosed by this examination, and assuming the statement of facts in Petitioners' Exhibit 4-A are true, and further assuming that the oral testimony presented in your hearing today is true, have you an opinion as to the reasonable value of the services performed herein

collectively by the petitioners, John W. Preston, Oliver O. Clark and David D. Sallee? Answer that yes or no. A. I have.

Q. Will you please give us the benefit of your opinion? A. In my opinion—

. . . . . .

The Witness: If the court please, may I have the question read?

The Court: The question calls for an expression of your opinion.

Mr. Preston: Yes. You answered the question 'yes,' and then my last question was: Give us the benefit of your opinion, if that is the question you are interested in. A. If I assume the valuations which have appeared in evidence at this hearing—

The Court: You just state a figure, if you will, please, assuming the property is worth a million dollars or thereabouts. A. Assuming the property to be worth a million dollars or from one million up to $1,047,000, as the two witnesses have testified, and if I am now to state a figure in dollars, I believe that a fee of $275—

Mr. Preston: 275 what? A. $275,000 as an award to the petitioners in this matter now on hearing would be a reasonable and a moderately reasonable fee.

And if, on the contrary, I assume from the discussions which I have heard and the remarks of your Honor, that there is a question yet to be determined, not before me, of valuation, and a substantially lower valuation might be determined by the court and therefore a percentage basis should be used as a means by which the court might determine a reasonable compensation, then in my judgment that percentage

should approximate twenty-seven and one-half per cent, and in no event should be lower than 25 per cent, might be as high as thirty-three and one-third per cent, and would not be unreasonable if it were 50 per cent."

The witness gave specific reasons for his valuation of petitioners' legal services as follows [see R. pp. 70-74]:

"I put the question, if I may explain, in the alternative in the light of the studies which I have made of this case and this record, and in the light of the testimony which has been given here, in order to facilitate your Honor in a determination which I know from experience in any case of this sort is difficult.

The Court: Have you assumed that the compensation of the attorneys, the petitioners here, is entirely dependent upon the outcome of this case?

The Witness: I have. But I should like to add to that answer, if the court please, that I, in this matter, as usual, referred to Canon No. 12, I believe it is, of the Code of Ethics of the American Bar Association, which, as I recall it, specifies six factors which normally should be considered by counsel in attempting to arrive at a reasonable fee and, to supplement that, refreshment of my memory by looking over certain notes and memoranda I had respecting fees which involved, in all probability, 10 or a dozen other factors.

Limiting my answer for the moment to matters mentioned in the Canon of the American Bar Association, the fact that compensation is taken on a contingency is one of the important factors to be considered. But I should add here that all factors under the holdings of the courts need not be given by a

witness as having equal weight under the circumstances in any particular case.

The Court: I take it you have taken into consideration the nature of the matter, the amount involved, the complexity of the problem?

The Witness: I have.

The Court: The responsibility imposed, the time spent, and the results achieved?

The Witness: I have taken all of those factors into consideration.

The Court: As well as the fact that all compensation—you have assumed all compensation to be contingent?

The Witness: I have.

The Court: Now, if you assume that compensation is not contingent what would be your opinion, both in dollars and in percentage?

The Witness: If I assumed that the compensation were not contingent and that the clients were financially able to pay what members of the profession would call a reasonable fee, I would not make a reasonable fee at the conclusion of the litigation and efforts made by counsel in this case on the 27th of last August at very much less than $250,000, if the court please, even if there were a fixed ability to pay.

The Court: That is, considering all the factors you have mentioned, except—

The Witness: The contingency.

The Court: —except the contingency. What would you say would be a reasonable percentage of the recovery, assuming that the fee was not contingent?

The Witness: As I stated a moment ago, I think that the recovery might well have been one-third to

a half. But I might explain that answer, if your Honor desires, by saying that from my study of the records in this case I would assume that Lee Arenas was, to use Judge Preston's phrase, put upon the country; that he would not have any greater or lesser rights than any other fully qualified citizen of the United States or than I myself might have if I had to go to the Bar with a problem such as his, making no distinction either in his favor or against him because of his being a member of the Mission Band of Indians, in which event I would have found that my fellow members of the Bar would have said to me: That you may expect this case, taken on a contingency, to be 25, 33⅓, or 50 per cent, depending upon the stage at which it may be concluded, which is well familiar to all of us.

The Court: If not taken upon the contingency, what percentage do you think the petitioners should be entitled to as reasonable fees for their services?

The Witness: I would think that if the case were not taken on a contingency, that a reasonable fee ought to provide for a base fee. By that I mean a fee not less than a certain sum plus the reasonable value of services.

If I did not answer your question, your Honor, I perhaps did not understand it.

The Court: Suppose they were not contingent, but upon the completion of the litigation, why, the client said: 'Well, gentlemen, you have recovered this property for me. That is all I have. I am willing to give you a share of what you have recovered'?

The Witness: Well, if that were true, your Honor—

The Court: What would be that percentage, then?

The Witness: I would not base the fee upon a percentage. I would have to take into consideration the other five factors of the American Bar Association over and above the contingency, and I might want to take into consideration some of the other factors established by the court.

The Court: Perhaps you did not understand my question. I am assuming that you are taking into consideration all other factors which you have mentioned.

The Witness: Then I would answer you—

The Court: But we will assume that the compensation is not contingent upon recovery.

The Witness: All right. If I now understand your statement correctly, I would say that it would be upon a percentage plus some other figure. I tried to answer that by saying it would be plus some basic compensation, with a percentage of the recovery of property or a percentage based upon the amount and success of the litigation, depending upon the success of the litigation, and that percentage, I think, would have to be analyzed in the particular case.

Now, in this particular case, if the court please, I have not made any such computation."

Mr. T. B. Cosgrove testified as follows [R. pp. 74-76]:

"Q. That is the case. Well, Mr. Cosgrove, if you were to assume the facts set forth in the Petitioners' Exhibit 4-A to be true and correct, and add to that your research of the exhibits mentioned here in 10, 10-A and -B, 11-A, 11-B, 12-A, -B, -C, 13-A, -B, -C and -D, and you applied to them the rules of law that are set forth in the authority that you refer to to the facts as detailed by these documents that you have examined, and couple that with your own

experience and judgment as a trial lawyer in this State, have you an opinion as to what would be or should be the reasonable value of the services performed by petitioners in this case known in the record as Arenas vs. The United States of America? A. Yes; I do.

Q. Have you any particular form in which you prefer to express your opinion, that is to say, in dollar value or in percentage of property recovered? A. I cannot express it in dollar value. I can express it only in percentage.

Q. Will you please give us the benefit of your opinion? A. 27½ per cent.

Q. 27½ per cent. You have given that idea much thought, have you not, Mr. Cosgrove? A. I have worked on it, I would say, several days.

Q. Several days. And that is the conclusion you reach. You said you could not put a dollar value on it. Why is that true? A. Because the value, as I understand it, is entirely uncertain, and in this statement which I have here it says the value of the lands recovered is considerably in excess of $1,000,000. That might mean 10,000,000.

Q. I see. If it was in excess of a million you would make it 27½ per cent? A. Well, I thought the value was a decidedly uncertain factor and I would not want to undertake any statement about what the value of the services were, expressed in dollars and cents.

Q. Then, if this court finds that value of the property to be much or little, your percentage would stand as a single item or a calculation, would it? A. That is correct. The figure I arrived at is not contingent upon whether it is worth more than a million or less than a million."

Mr. Cosgrove further testified as follows [R. pp. 77-78]:

> "The Court: Let us assume the value of the land is $100,000.
>
> The Witness: It would still be 27½ per cent.
>
> The Court: If it was $50,000 would it still be the same?
>
> The Witness: Still be the same; yes.
>
> The Court: And if it were a million dollars?
>
> The Witness: It would still be the same."

The evidence of Mr. Martineau and Mr. Cosgrove is not contradicted. The valuations placed by them upon petitioners' services to Lee Arenas are more than the Court allowed by its judgment.

It is quite clear that the aggregate fee of 22½% allowed to all three of the petitioners—that is, 10% to Messrs. Clark and Sallee, and 12½% to Judge Preston—is fully sustained, and is not contradicted by the evidence. The findings of the Court [Findings Nos. VII and VIII, R. pp. 42-43 and 44] are likewise fully supported by the evidence.

In *United States v. Anglin & Stevenson,* 145 F. 2d 622, the Court of Appeals for the Tenth Circuit made an allowance for fees of 25% of the value of the estate of Jackson Barnett, an incompetent Creek Indian. There, as here, the reasonableness of the fee allowed was challenged. In disposing of the contention of the United States, the Court said at page 630:

> "The United States also challenges the reasonableness of the attorneys' fees allowed, contending that by the Government's participation in the suit, it greatly facilitated and expedited the determination

of the rightful heirs, and assisted counsel for appellees and the court in reaching a just result, thereby minimizing and reducing the time, efforts, and expense of the appellees. It is true, as contended, that a representative of the United States was present and participated in every step of the proceedings—not only the Attorney General's office assisted in the taking of depositions, securing witnesses, and identifying heirs, but a representative of the Federal Bureau of Investigation was present during all or most of the proceedings for the purpose of combatting perjury and fraudulent claims. It is also true that the Secretary approved the so-called family settlement which enabled the three family groups to present a united front, and in other ways the Government threw its weight on the side of the rightful heirs. But at no time in the trial did it assume a role of an advocate in their favor, instead it maintained a position of strict neutrality throughout the proceedings. The position taken by the Government, and its contribution to the trial, did not avoid the necessity of employing counsel on a contingent basis and the expenditure of $33,561.63, which the Government does not deny was prudently spent in the prosecution of the suit. It is unnecessary to further detail the course of the litigation, suffice it to say that it was long and tedious, and consumed the time, talents and money of the appellees over a period of approximately five years. The outcome of the litigation was necessarily uncertain and the appellees assumed all of the hazards of it.

"The allowance of 25% of the amount recovered is well within the proof adduced on this record in support of a reasonable attorney's fee, and it is well settled that in cases of this kind the allowance of attorney's fees is within the judicial discretion of the

trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. And an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong. City of Wewoka v. Banker, 10 Cir., 117 F. 2d 839. That rule would seem to have cogent application in view of the rich and mature background of the learned trial judge. As a distinguished lawyer of the Indian Territory and of Indian law; first Chief Justice of the Supreme Court of the State of Oklahoma; Governor of the State; twenty years a judge of the United States District Court which comprises the Indian Territory; a judge of the United States Circuit Court of Appeals for the Circuit in which Indian litigation is plentiful, and as one whose conservatism and frugality are so well known, we do not know of anyone better qualified by knowledge and experience to fix and determine the amount of attorneys' fees, particularly in cases of this kind. Certainly, it does not lie within the competency of this court to disturb his judgment on this record.

"The judgment is affirmed."

Conclusion.

The findings of the District Court in respect to the value of petitioners' services in behalf of Lee Arenas in this litigation are amply supported by the evidence adduced, and the judgment should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
By JOHN W. PRESTON,
Petitioners and Appellees.

No. 12046

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,

Appellees.

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

APPELLEES' BRIEF IN REPLY TO THE BRIEF OF THE UNITED STATES.

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TOPICAL INDEX

PAGE

Opinions below 1

Jurisdiction 2

Statutes involved 2

Questions presented 3

Statement 4

Summary of argument 5

Argument 6

I.

The District Court has jurisdiction and power to allow attorney's fees and expenses of suit in this equitable action 6

(A) Jurisdiction conferred by 25 U. S. C. A., Sec. 345, is equitable 6

(B) Federal courts in equity suits have power to allow attorneys' fees and expenses of suit as between attorney and client 8

(C) District courts in equity suits have power to allow attorneys' fees and expenses of suit and to require payment thereof out of the restricted lands of an Indian under the circumstances of this case 12

(D) The authorities cited by the United States are not applicable in this proceeding 21

II.

The District Court in the exercise of its equity jurisdiction, has power to impress a lien upon the lands allotted to Arenas to secure the payment of attorneys' fees and expenses of suit 23

III.

The District Court, in the exercise of its equity jurisdiction, has power to order a sale of the property allotted to Lee Arenas, or such portion thereof as may be necessary, to pay and satisfy the lien and judgment awarded to appellees 27

(A) To follow the position of the United States would do the Indians claiming allotments a distinct disservice 30

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases	PAGE
Abruzzo's Estate, In re, 249 N. Y. Supp. 72, 139 Misc. 559	23
Adkins v. Children's Hospital, 261 U. S. 525	20
Anglin & Stevenson v. United States, 160 F. 2d 670	12, 17, 19
Arenas v. United States, 60 Fed. Supp. 411	6, 7, 12
Bloom v. Morgan, 163 Fed. 395	23
Burdon etc. Co. v. Ferris Sugar Co., 78 Fed. 417	29
Byrne, In re, 97 Fed. 762	29
Gerard v. United States, 167 F. 2d 951	6
Gillespie, In re, 190 Fed. 88	24
Graber v. McMullin, 56 F. 2d 497, cert. den. 287 U. S. 603	24
Halbert v. United States, 283 U. S. 753	6
Holbrook v. Phelan, 121 Cal. App. 781	29
Hotchkiss v. Nat'l City Bank, 200 Fed. 287, aff'd 201 Fed. 664, 231 U. S. 50	28
Hy-Yu-Tse-Mie-Kin v. Smith, 194 U. S. 401	6
King v. Thompson, 9 Pet. 204, 9 L. Ed. 102	29
Louisville, E. & St. R. R. Co. v. Wilson, 138 U. S. 507, 11 S. Ct. 405, 34 L. Ed. 1023	9, 24
Maher, In re, 169 Fed. 997	29
Mahone v. Southern Tel. Co., 33 Fed. 702	25
McCormick's Estate, In re, 14 N. J. Misc. 73, 183 Atl. 485	23
National Cash Register Co., In re, 174 Fed. 579	29
Pape v. United States, 10 F. 2d 219	6, 7
Peck v. Jenness, 7 How. 612, 12 L. Ed. 841	28
Platt v. Jerome, 19 How. 384, 15 L. Ed. 623	24
Riddle v. Hudgins, 58 Fed. 490	29
Shakers Soc. v. Watson, 68 Fed. 730	29
Sprague v. Ticonic National Bank, 307 U. S. 161, 59 S. Ct. 777	8, 9, 12

PAGE

Texas v. White, 10 Wall. 483, 19 L. Ed. 992 25
The Menominie, 36 Fed. 197 29
Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157 ..... 9, 12
United States v. Anglin & Stevenson, 145 F. 2d 622 ..... 12, 17, 25
United States v. Arenas, 158 F. 2d 730 ..... 6, 7, 21
United States v. Equitable Trust Co., 283 U. S. 738, 51 S. Ct. 639, 75 L. Ed. 1379 ..... 12, 13, 16, 25
United States v. Hillard, 322 U. S. 363 6
Vidal v. S. American Sec. Co., 276 Fed. 855 28
Webster v. Sweat, 65 F. 2d 109 23
Wilson, In re, 12 Fed. 235 24

Statutes

Act of August 15, 1894 (25 U. S. C. A., Sec. 345) 2, 3, 5, 6, 7, 16, 20, 21, 22
Act of March 2, 1917 (39 Stats. 969-972) 4
General Allotment Act (Act of Feb. 8, 1887, 24 Stats. 388) 2
Mission Indian Act (Act of Jan. 12, 1891, 26 Stats. 712) 2
United States Code Annotated, Title 28, Sec. 225(a) 2
United States Constitution, Art. III, Sec. 1 20

Textbooks

33 American Jurisprudence, p. 441 27
16 California Jurisprudence, p. 353 29
37 Corpus Juris, p. 308 27
61 Corpus Juris, pp. 766-767, notes 80, 81 24
7 Corpus Juris Secundum, p. 1142 23
7 Corpus Juris Secundum, p. 1142, note 78 24

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vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

APPELLEES' BRIEF IN REPLY TO THE BRIEF OF THE UNITED STATES.

Opinions Below.

The District Judge presiding at the hearing of the petition for allowance of attorneys' fees and expenses of suit did not write an opinion; but said Judge orally stated his opinion which appears at pages 59-66 of the record.

The opinion of the District Court at the trial of this cause upon the merits appears in 60 Fed. Supp. at pages 411-428, and is important in the consideration of appellees' right to attorneys' fees and expenses of suit.

Jurisdiction.

The District Court had equitable jurisdiction under the Act of August 15, 1894, as amended, 25 U. S. C. A. Section 345, to determine the right of Lee Arenas to trust patents covering the lands selected for allotment by him and his deceased wife Guadaloupe Arenas, and to adjudge and decree his said right with the same effect as if such trust patents had been issued by the Secretary of the Interior.

The equitable jurisdiction of the District Court under Title 25 U. S. C. A., Section 345, extends to the allowance of attorneys' fees and expenses of suit to the attorneys of record for Lee Arenas.

This court has jurisdiction upon appeal under Title 28 U. S. C. A., Section 225(a).

Statutes Involved.

The Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, which is quoted at pages 2-3 of the Brief of the United States, and portions of the Mission Indian Act (Act of January 12, 1891, 26 Stat. 712) and of the General Allotment Act (Act of February 8, 1887, 24 Stat. 388, as amended) are involved. Certain applicable portions of said Acts are set forth in the Appendix to Appellants' Brief, pages 32-34, and need not be recopied here.

Questions Presented.

The Government's brief presents only two questions of law for decision on this appeal, namely:

1. Did the District Court have jurisdiction to impress a lien upon the lands decreed in this suit to be allotted to Lee Arenas, or to enforce such lien by appointing a receiver or by ordering a sale of the property?

2. Did the District Court have jurisdiction to hear and determine appellees' supplemental petition for the allowance of attorneys' fees and expenses of suit under 25 U. S. C. A., Section 345?

We think these questions should be argued in inverse order.

3. We think there is the additional question: If the District Court had equity jurisdiction under 25 U. S. C. A., Section 345, to adjudge and decree the equitable right of Lee Arenas to a trust patent to the lands selected by him and his wife Gudaloupe for allotment, did not such equity jurisdiction necessarily extend to the allowance of attorneys' fees and expenses of suit and the payment thereof out of the lands recovered for Arenas by said attorneys?

Statement.

Appellees concur to a limited extent in the "Statement" in the Government's Brief (pp. 4-10). This concurrence applies, however, only to the *facts* therein stated. Appellees totally disagree with the conclusions drawn therefrom. Such additional facts as may be necessary to a proper consideration of this appeal will be stated under the several points of the argument, *infra*.

The suit out of which this fee proceeding arose was made necessary by the wilful failure and refusal of the United States, as trustee for Lee Arenas, Guadaloupe Arenas, and other members of the Palm Springs Band of the Mission Indians of California, to approve their selections of lands for allotment and to issue trust patents therefor to the several Indians entitled thereto. The position of the United States in this suit is that of a trustee who has violated its trust. For more than thirty years, it has opposed all efforts of the members of the Palm Springs Band of Mission Indians to secure allotments of land in severalty, and trust patents therefor. Moreover, this opposition has been maintained contrary to the Congressional Mandate directing it to make such allotments. (Act of March 2, 1917, 39 Stat. 969-972.) The United States has thus failed and refused to discharge its fiduciary duty to these Indians, and has thereby compelled them to employ counsel and seek equitable relief in the District Court. With equal pertinacity and injustice, it now actively opposes the allowance of attorneys' fees and expenses of suit made

necessary by its own neglect and refusal to perform its duty as such fiduciary.

The position of the Government in respect to the claims of the Palm Springs Band of Mission Indians for allotments in severalty and trust patents thereto, and its present position in respect to attorneys' fees and expenses of suit, are contrary to every concept and principle of equity and justice, and are entitled to scant consideration.

It is significant that in its brief the Government dwells at great length upon technicalities of law, but ignores the equities underlying appellees' right to fees and expenses made necessary by its breach of fiduciary duty.

Summary of Argument.

The United States has consented to be sued in this action. (Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345.)

The jurisdiction of the District Court under 25 U. S. C. A., Section 345, is equitable.

In the exercise of its equity jurisdiction the District Court has power to allow attorneys fees and expenses of suit.

As an incident to the exercise of its equity jurisdiction the District Court may impress a lien upon the property recovered to secure the payment of attorneys' fees and expenses of suit. It may also order a sale of such property, or so much thereof as may be necessary, to satisfy the lien fixed by its decree.

ARGUMENT.

I.

The District Court Has Jurisdiction and Power to Allow Attorney's Fees and Expenses of Suit in This Equitable Action.

The Act of August 15, 1894, as amended (25 U. S. C. A., Section 345) evidences the consent of the United States to be sued by any person of Indian blood or descent who claims to be entitled to an allotment of land in severalty. Said Act expressly confers jurisdiction upon the District Courts "to try and determine any action, suit, or proceeding . . . involving the right of any person, in whole or in part of Indian blood or descent, to any allotment . . ." and the decree of such Court in favor of a claimant shall operate as an approved allotment.

(A) Jurisdiction Conferred by 25 U. S. C. A., Sec. 345, Is Equitable.

The jurisdiction conferred upon the District Court by Title 25, U. S. C. A., Sec. 345, is essentially equitable. It could not be otherwise, since manifestly the suit authorized is that of the beneficiary of a trust against the trustee thereof.

The Federal Courts have uniformly held that such a suit is of equitable nature.

Halbert v. United States, 283 U. S. 753;
Hy-Yu-Tse-Mie-Kin v. Smith, 194 U. S. 401;
Gerard v. United States, 167 F. 2d 951;
United States v. Hillard, 322 U. S. 363, 368;
Arenas v. United States, 60 Fed. Supp. 411, 419;
United States v. Arenas, 158 F. 2d 730, 746-747;
Pape v. United States, 10 F. 2d 219.

In these and numerous other cases the Courts have indicated, by the use of the word "suit," and in numerous other ways that an action for an allotment under Section 345 of Title 25, U. S. C. A., is equitable.

In *Pape v. United States,* 10 F. 2d 219, *supra,* this court said, in the opening paragraph of the opinion:

> *"This is a suit in equity,* brought by Elsie Wilson Pape, guardian *ad litem,* under the Act of August 15, 1894 (28 Stat. 305, as amended, 31 Stat. 760 (Comp. St. Sec. 421)), to secure allotments of Indian lands for her children." (Italics ours.)

In the case at bar the learned trial judge who heard the case on its merits said (*Arenas v. United States,* 60 Fed. Supp. 411, at page 419):

> "It must be borne in mind that this is an equitable suit bringing into play equitable doctrines, and that the Government is dealing with Indians under a guardian and ward relationship. (Citing cases.) For upwards of a hundred years the United States Supreme Court has unequivocally, and many times with vehemence, set forth the positive duty of the United States toward its Indian wards. (Citing cases.)"

This Court affirmed the decree of the District Court in so far as the principle stated is concerned. (*United States v. Arenas,* 158 F. 2d 730.)

(B) Federal Courts in Equity Suits Have Power to Allow Attorneys' Fees and Expenses of Suit as Between Attorney and Client.

It is well settled that Federal Courts in equity suits have power to allow counsel fees and expenses of suit in appropriate situations, since that is a part of the historic equity jurisdiction of such Courts. (*Sprague v. Ticonic National Bank,* 307 U. S. 161, 59 S. Ct. 777, and cases cited in notes 1 and 2 at page 779.)

The rule is stated in the *Sprague Ticonic* case, *supra,* at page 779 (59 S. Ct.) as follows:

> "Obviously, both courts disposed of the petition not as a considered disallowance of attorney's fees and litigation expenses in the circumstances of the particular suit but because they deemed award of such costs beyond the power of the District Court. . . .
>
> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The 'suits in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery (citing cases) subject, of course, to modifications by Congress, *e. g.,* Michaelson v. United States, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451. The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs 'between party and party', but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs 'as between solicitor and client'."

The entire opinion is valuable as showing the power of the Federal Courts in equity suits to allow attorneys' fees and expenses of suit not only as between solicitor and client but also as between party and party. The *Ticonic* case involved the right of a party, who did not sue as one representing a class, to hold others benefited by the litigation liable for attorneys' fees and expenses of suit.

The power of the Federal Courts to allow attorneys' fees and costs "as between solicitor and client" has never been in doubt since the decision of the Supreme Court in *Trustees v. Greenough,* 105 U. S. 527, 26 L. Ed. 1157. In that case Mr. Justice Bradley, speaking for the Court, one Justice dissenting, reviewed the English and American decisions and texts and held, broadly, (1) that it is a general principle that a trust estate must bear the necessary expenses of its administration, and (2) that one jointly interested with others in a common fund who maintains an action to save it from waste or destruction may have contribution from such others of proportional shares of attorneys' fees and expenses. A much simpler and stronger case is presented where, as here, it is a matter solely between solicitor and client.

The reasons underlying the rule invoked are thus stated in *Louisville, E. & St. R. R. Co. v. Wilson,* 138 U. S. 507, 11 S. Ct. 405, 407, 34 L. Ed. 1023:

> "We think it may fairly be held that a party who takes the benefit of such a service ought to pay for it, and that equity may properly decree payment therefor. As justly remarked by Lord Kenyon in Read v. Dupper, 6 Term R. 361, 'the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these

> fruits were obtained.' In Renick v. Ludington, 16 W. Va. 378, 392, it is said: 'The lien (even in cases of *quantum meruit*) is in the nature of an equitable lien (Vanleer v. Vanleer, 3 Coop. (Tenn.) page 23), and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment. See, also, Mahone v. Southern Tel. Co. (C. C.) 33 F. 702, and in re Paschal, 10 Wall. 483 (19 L. Ed. 992)."

The equitable principles stated in the foregoing decisions are ignored in the Government's brief, although they form a necessary part of the law applicable to this proceeding.

It should not be forgotten that Lee Arenas is bound by his contract, since he is *sui juris*. He is competent to contract in his own right. This was admitted in the Government's brief filed in this Court upon its appeal from the judgment on the merits, in the following language:

> "Indians may make contracts in the same way as other people except where prohibited by statute. Posthook v. Lee, 46 Okla. 477, 149 Pac. 155, 156 (1915). In re Stinger's Estate, 61 Mont. 173, 201 Pac. 693 (1921). There is no statute which bars Lee Arenas from contracting with his attorneys in this case so long as the contract does not undertake to alienate or burden restricted property. The fact that Lee Arenas is a citizen exempts him from the scope of R. S. 2103, 25 U. S. C. A. Sec. 81. Plaintiff (Arenas) may pay court costs, attorneys' fees, and other expenses just

as he pays the expenses of his daily living. A judgment may be obtained against an Indian for breach of a contract even though unenforceable because his property is restricted. Stacy v. LaBelle, 99 Wis. 520, 75 N. W. 60 (1898). An Indian has the same right as any one else to be represented by counsel of his own selection. Cf. Roberts v. Anderson, 66 F. 2d 874 (C. C. A. 10, 1933)."

So, here we have a case where an Indian competent to contract has agreed with his attorneys to pay attorneys' fees and necessary expenses of litigation; the litigation is successful; and the Indian receives his allotments and the equivalent of trust patents to property valued at from one-quarter of a mililon dollars to more than one million dollars, although the Government has opposed him with all its legal resources at every step of the litigation. Now, the Government says a Court of equity must deny to these attorneys any fees and expenses of suit for services directly responsible for securing rights in valuable property long denied to him by the Government, because, forsooth, it claims the Court cannot exercise its historic equity power to allow attorneys' fees and expenses of litigation. If such a claim were advanced by an individual, instead of by the Sovereign, it would be denounced as shocking to the conscience of the chancellor. In our opinion, it is not less shocking because urged by the Government. Moreover, it is not the law of this case.

(C) District Courts in Equity Suits Have Power to Allow Attorneys' Fees and Expenses of Suit and to Require Payment Thereof Out of the Restricted Lands of an Indian Under the Circumstances of This Case.

The equitable rule announced in the *Ticonic* case, *supra,* and in *Trustees c. Greenough, supra,* has been held to apply as between Indians and their attorneys. It has also been held to apply to incompetent Indians, and to restricted property of Indians.

United States v. Equitable Trust Co., 283 U. S. 738, 51 S. Ct. 639, 75 L. Ed. 1379;

United States v. Anglin & Stevenson, 145 F. 2d 622;

Anglin & Stevenson v. United States, 160 F. 2d 670.

The rule was also recognized by two learned trial Judges in the case at bar.

Arenas v. United States, 60 Fed. Supp. 411;

(*Id.*) Judgment, R. p. 53; Opinion (oral), R. pp. 59-66.

The District Judge, in this proceeding, stated his views, R. p. 66, as follows:

> "In other words, it is my view that the Court, having jurisdiction under 25 U. S. C. Sec. 345 to render the relief in the main action, has jurisdiction to affect the land, and that the United States has consented to the exercise of full equitable jurisdiction in this action."

We think this view is amply supported by both reason and authority.

In *United States v. Equitable Trust Co.,* 283 U. S. 738, *supra,* the Supreme Court held that the restricted property of Jackson Barnett, an incompetent Creek Indian, was subject to the payment of attorneys' fees and expenses of suit. The restricted property consisted of Liberty Bonds of the value of $1,100,000.00, which Barnett had given away, with the consent of the Secretary of the Interior, to his wife and to the American Baptist Home Mission Society. About one year after the gifts were made and approved, the Oklahoma guardian of Barnett, having received information as to the gifts, "invoked the assistance of able counsel" who thereafter "brought the facts to the attention of the Secretary of the Interior, and earnestly and repeatedly requested that officer to take steps to secure a restoration of the bonds to the trust fund," but the "Secretary declined to take such action, insisted the distribution was valid and must stand, and refused to permit any moneys under his control and belonging to Barnett to be used in an effort to recover the bonds." (283 U. S. 741.)

In this situation, obviously analogous to the situation of Arenas in the case at bar, the Oklahoma guardian, as next friend of Barnett, secured Counsel who brought a suit in equity in the District Court for the Southern District of New York. About one year after the suit was filed the Attorney General sought and obtained leave for the United States to intervene in the suit "and thereby participate in the effort to effect a recovery of the bonds and their income for Barnett's benefit." (*Id.* p. 742.) Thereafter, both the Attorney General and the attorney for the next friend "harmoniously prosecuted the action to a successful conclusion" (*Id.*), but the major burden of the litigation fell upon the attorneys for the next friend. (*Id.*) A decree was entered for the restoration of the

bonds to the Secretary of the Interior, but a reservation was made therein, as here, for later taking up the matter of allowance of attorneys' fees and expenses of suit. (*Id.* p. 743.)

Upon the filing of the application for allowance of attorneys' fees and expenses of suit by the next friend, the United States, as here, actively opposed any such allowance. The District Court allowed the next friend $7,500.00 for his services and his attorneys $184,881.08 for their services and $4,282.93 for their expenses, and ordered that these sums be paid out of the bonds recovered in the suit. The Government appealed and the Circuit Court of Appeals affirmed the decree, but reduced the attorneys' fee to $100,000.00. The Supreme Court granted certiorari upon the application of the United States, and affirmed the judgment, but further reduced the attorneys' fee to $50,000.00.

The United States insisted that the bonds, or "fund," were "restricted" property, hence "not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior," and argued "that the Court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions." (*Id.* p. 744.) The same argument is made in the case at bar.

But, the Supreme Court thought the argument was unsound, brushed it aside, and decided the question of fees in accordance with principles of equity. The Court said (*Id.* pp. 744-746):

> "It is a general rule in courts of equity that a trust fund which has been recovered or preserved through

their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed specially applicable where the fund belongs to an infant or incompetent who is represented in the litigation by a next friend. 'Such a rule of practice,' it has been said, 'is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law—indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress.'

"Counsel for the United States concede the general rule, but regard it as inapplicable here. They assume that Barnett's fund was restricted in the sense that it was not subject to disposal in any form or for any purpose, save with the approval of the Secretary of the Interior; and from this they argue that the court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions.

"We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose and the fair import of their words. Without doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees, but we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience had shown to be essential to the adequate protection of a wronged *cestui que* trust such as Barnett was shown to be.

"The refusal of the Secretary of the Interior and the failure of the Department of Justice to take any

steps to correct the wrong amply justified the institution, in 1925, of the suit in the name of Barnett by the next friend. The United States intervened only after the suit had proceeded for a full year. Its purpose in intervening, as shown by the record, was not to supplant or exclude the next friend and his attorneys, but to aid in establishing and protecting Barnett's interest in the fund in question. In its petition of intervention it prayed that this fund, 'after deducting the reasonable expenses of this litigation,' be restored to the custody of the Secretary of the Interior. Later on it acquiesced in an order allowing the next friend's attorneys $3,000 from the fund to meet expenses about to be incurred. In all the proceedings which followed the intervention it co-operated with the next friend to the single and that the diverted fund be recovered for Barnett's benefit. And both were satisfied with the main decree when it was rendered.

"When all is considered, we are brought to the conclusion that the United States by its intervention and participation in the suit consented, impliedly at least, that reasonable allowances be made from the fund, under the rule before stated, for the services and expenses of the next friend and his attorneys."

The principles stated by the Supreme Court in the *Equitable Trust* case, *supra,* need no elaboration here. The analogy between the situations in that case and here is too plain to escape the attention of this Court.

In the *Equitable Trust* case the consent of the United States necessary for allowance of fees and expenses was *implied; here consent is expressly given by statute.* (25 U. S. C. A., Sec. 345.) Hence, here, as there, such fees and expenses can be paid out of restricted property with-

out the consent or approval of the Secretary of the Interior for reasons that are identical in each case.

The decisions of the Circuit Court of Appeals for the Tenth Circuit in *United States v. Anglin & Stevenson,* 145 F. 2d 622, and in *Anglin & Stevenson v. United States,* 160 F. 2d 670, fully support the proposition that, under circumstances such as are involved in the case at bar, the restricted property of an Indian may be held subject to allowance and payment of attorneys' fees and expenses of suit. Each of these cases involved the estate of Jackson Barnett, the same Indian involved in the *Equitable Trust* case, *supra.*

Following the death of Jackson Barnett, many Indians claimed to be his heirs, and numerous suits were filed, both in state and federal courts, to determine heirship. The District Court for the Eastern District of Oklahoma assumed exclusive jurisdiction in the several cases (*United States v. Anglin & Stevenson,* 145 F. 2d 622) and held that three certain groups of Indians were Barnett's heirs. The United States had previously intervened and filed appropriate pleadings in the case. The trial court held that by so doing the United States "consented to the court's jurisdiction over the Estate, which was the subject matter of the litigation, for the purpose not only of determining heirship and distributing the Estate, but also to allow a reasonable attorneys' fee and expenses to the attorneys who recovered the funds for those found to be lawfully entitled to the estate." (145 F. 2d 624.) Thereafter Anglin & Stevenson and other attorneys representing the successful heirs filed their application for allowance of attorneys' fees and expenses, and the trial court awarded them 25% of the value of the estate, all of which was held by the Secretary of the Interior in trust for Jackson

Barnett. The United States opposed, as here, allowance of any fees and expenses, and following judgment appealed to the Circuit Court of Appeals. The Court said, at page 624 (145 F. 2d):

> "The allowance of the fees to be paid out of the inherited funds recovered as the distributive shares of the Indian clients, is based upon the rule that where an attorney recovers a fund for the benefit of his client and others, those benefited thereby become obligated to pay the cost of the recovery and preservation of the fund, including a reasonable 'between solicitor and client fee.' The rule springs directly from the 'authority of the chancellor to do equity in a particular situation,' Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 59 S. Ct. 777, 780, 83 L. Ed. 1184, and has been applied under variant circumstances wherever right and justice require it. Sprague v. Ticonic Nat. Bank, *supra;* United States v. Equitable Trust Co., 283 U. S. 738, 51 S. Ct. 639, 75 L. Ed. 1379; City of Wewoka v. Banker, 10 Cir., 117 F. 2d 839; O'Hara v. Oakland County, 6 Cir., 136 F. 2d 152; Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Wallace v. Fiske, 8 Cir., 80 F. 2d 897; In re Middle West Utilities Co., D. C., 17 F. Supp. 359; Clarke v. Hotsprings Electric Light & Power Co., 10 Cir., 76 F. 2d 918; Security National Bank of Watertown v. Young, 8 Cir., 55 F. 2d 616, 84 A. L. R. 100; Nolte v. Hudson Navigation Co., 2 Cir., 47 F. 2d 166; Central Railroad & Banking Co. of Georgia v. Pettus, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915. In United States v. Equitable Trust Co., *supra,* the rule was recognized and applied in a suit involving this Estate, and the appellees rely upon it to support not only the application of the equitable rule, but to sustain the jurisdiction of the court over the fund from which the costs are to be paid."

Time and space forbid more extensive quotation from the opinion, but it is commended to the close scrutiny of this Court. The effect of the decision was to subject the restricted funds of Barnett's heirs, in the custody and control of the Secretary of the Interior as their guardian or trustee, to the allowance and payment of attorneys' fees and expenses.

In the subsequent case of *Anglin & Stevenson v. United States,* 160 F. 2d 670, the attorneys claimed they should have interest on the amounts of their fees and expenses. The Court denied them interest. In its opinion the Court referred to the former proceeding and said in respect thereto, at page 673:

> "We recognized the restricted character of the funds and that the Secretary held the same as guardian of his Indian wards in a sovereign capacity. United States v. Anglin & Stevenson, *supra,* 145 F. 2d at page 628. We held, however, that equitable jurisdiction to determine heirship and settle the estate carried with it as a necessary incident the power to award reasonable attorney fees and expenses to the attorneys for the successful heirs. In so holding, we pointed out that when the court acquired jurisdiction over the subject matter on petition of the United States under Section 3 of the Act of April 12, 1926, 44 Stat. 240, it was thus empowered to hear and determine all matters involved in the suit and enter a judgment binding upon the United States 'to the same extent as though no Indian lands were involved.' See also Caesar v. Burgess, 10 Cir., 103 F. 2d 503. *And that the Government having thus expressly given its consent to be bound by the judgment, it could not stop the equitable processes short of final adjudica-*

> *tion—that the determination of the heirship and the award of attorneys fees was one continuous litigatory process.*" (Italics ours.)

In the italicized portion of the matter last above quoted is found the complete answer to the Government's contention here made, namely, that since Section 345 of Title 25 U. S. C. A. does not in express words authorize allowance of fees none can be awarded. It is not necessary to expressly provide for such allowance; the power to allow fees inheres where jurisdiction is present.

The United States, by reason of Section 345, *supra,* consented to be sued in equity by any Indian who claims to be entitled to an allotment of lands in severalty. It thus consented to be bound by any decree pronounced by such court in the exercise of its historic equity jurisdiction,

> "And . . . having thus expressly given its consent to be bound by the judgment, it could not stop the equitable processes short of final adjudication—that the determination of heirship and the award of attorneys' fees was one continuous litigation." (160 F. 2d 673.)

This is but another way of saying that when Congress confers jurisdiction upon the District Court, that Court may then and thereunder exercise all of "the judicial power of the United States." (Constitution of United States, Art. III, Section 1.) "Judicial power" is said to be "that power vested in courts to enable them to administer justice according to law." (*Adkins v. Childrens' Hospital,* 261 U. S. 525, 544.) That power, as distinguished from jurisdiction, derives from the Constitution itself, and in equity suits embraces the rules and principles laid down by English Courts of Chancery. Having granted the neces-

sary jurisdiction, the Government may not thereafter confine and limit the judicial power incident thereto within a narrow legalistic straight-jacket, as it is attempting to do here. Or, as stated, *supra,* "it could not stop the equitable processes short of final adjudication," including award of attorneys' fees.

(D) The Authorities Cited by the United States Are Not Applicable in This Proceeding.

The Government's argument is based upon a narrow construction of Section 345 of Title 25 U. S. C. A. Moreover, it is erroneous.

The basic weakness of the Government's position is that it fails to take into account the fact that the suit authorized by Section 345 is equitable, and that principles of equity are to be applied in such a suit. When so considered, it is manifest that by its consent to be sued it likewise consented that the historic equitable jurisdiction and power of the District Court should be exercised to the fullest extent necessary "to administer justice according to law," that is, to do equity between all persons involved in the suit.

The decisions cited in the Government's brief do not extend to the situation presented by this appeal. It may be conceded that the United States is interested in the allotted lands, *but only as a trustee for Arenas.* It was also interested, as such a trustee, in the funds and estate of Jackson Barnett, but that fact was held insufficient to prevent allowance and payment of attorneys' fees and expenses out of the restricted, or trust, property of the Indian.

The assertion of the United States, that this Court's former decision (*United States v. Arenas,* 158 F. 2d 730)

conflicts with the District Court's decision in this fee proceeding, is erroneous. The excerpt quoted is torn from its context, and does not have the meaning attributed to it. There the Government urged that, by the reservation in the decree in respect to future hearing in respect to fees, "a judgment would be entered against the United States for such expenses," and it further urged that Section 345 of Title 25 U. S. C. A., "by which the United States consented to this suit, does not authorize the imposition of liability for costs or other expenses of litigation against the Government." (158 F. 2d 753.) This Court said in respect to the contentions made:

> "We agree entirely with the appellant's construction of the Act of 1894 (25 U. S. C. A. Section 345). The difficulty with the appellant's argument, however, is that it has no application to the case at bar.
>
> "The judgment of the court below seeks to impose no liability for any expenses of litigation upon any one, certainly not the United States. The appellant does not question the court's right to leave the case open for such future action as it may deem proper: the objection is that 'presumably' the lower court is planning to mulct the Government for the appellee's attorneys' fees.
>
> "There is neither internal nor external evidence that the judgment reflects any such intention, or any other unlawful or unfair intention. So far as the appellant is concerned, any objection to this paragraph of the judgment is not only premature, but moot. For this reason, this Court refrains from making any ruling on the subject." (*Id.* p. 753.)

The Government's assertion of inconsistency or conflict is thus shown to be wholly unfounded.

II.

The District Court in the Exercise of Its Equity Jurisdiction, Has Power to Impress a Lien Upon the Lands Allotted to Arenas to Secure the Payment of Attorneys' Fees and Expenses of Suit.

In its judgment, the District Court adjudged and decreed:

> "That the payment . . . (of fees and expenses) for the use and benefit of said plaintiff, be and the same is hereby secured by an equitable lien upon the allotments . . . and upon all rights conferred by said allotments, and upon the entire interest and estate of Lee Arenas and his heirs in the lands embraced within said allotment . . ." [R. p. 52.]

This lien is a charging lien upon the property secured for Arenas by the labor and skill of appellees. It is in its nature a special equitable lien which arises out of the right of an attorney to look to the judgment or recovery obtained through his skill and labor for his reasonable fees.

Webster v. Sweat (5 Cir.), 65 F. 2d 109;

In re McCormick's Estate, 14 N. J. Misc. 73, 183 Atl. 485;

In re Abruzzo's Estate, 249 N. Y. Supp. 72, 139 Misc 559;

Bloom v. Morgan, 163 Fed. 395, 397.

In 7 Corp. Jur. Secundum 1142, it is said:

> "The lien is based on the natural equity that plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment."

Supporting the text quoted, see *Graeber v. McMullin,* 56 F. 2d 497 (10 Cir.), cert. denied 287 U. S. 603; *In re Wilson,* 12 Fed. 235; *Platt v. Jerome,* 19 How. 384, 15 L. Ed. 623; *In re Gillespie,* 190 Fed. 88; and many state cases decided by the Courts of Alabama, Colorado, Georgia, Illinois, Indiana, Maine, Michigan, Montana, Nebraska and New York. (See notes 80 and 81, 61 Corpus Juris, pp. 766-767; and note 78, 7 Corpus Juris Secundum, p. 1142, where the cases are collected.)

The principle stated, supra, has the express approval of the Supreme Court of the United States. In *Louisville, E. & St. R. R. Co. v. Wilson,* 138 U. S. 507, already cited, the Supreme Court said:

> "We think it may fairly be held that a party who takes the benefit of such a service ought to pay for it, and that equity may properly decree payment therefor. As justly remarked by Lord Kengor in Read v. Dupper, 6 Term R. 361, 'the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained.' In Renick v. Judington, 16 W. Va. 378, 392, it is said: 'The lien (even in cases of *quantum meruit*) is in the nature of an equitable lien (*Vanleet v. Vanleet,* 3 Coop. (Tenn.) Page 23), and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment.' See, also, *Mahone v. Southern Tel. Co.* (C. C.) 33 F. 702, and In re Pascal, 10 Wall. 483 (19 R. Ed. 992)."

In addition to the foregoing authorities, the Supreme Court has held, expressly or by necessary implication, that such a lien may be impressed upon the property recovered for an Indian although it is restricted.

United States v. Equitable Trust Co., 283 U. S. 738, 744;

United States v. Anglin & Stevenson, 145 F. 2d 622, 629.

In the *Equitable Trust* case, the Supreme Court said (283 U. S. 744):

> "It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention *may be charged* with the costs and expenses, including reasonable attorney's fees, incurred in that behalf; and this rule is deemed especially applicable" (as to the property recovered for the incompetent Indian Barnett). (Italics ours.)

To the same effect: *United States v. Anglin & Stevenson,* 145 F. 2d 622, at page 629. See also, *Texas v. White,* 10 Wall. 483, 19 L. Ed. 992, where the principle was approved as against a sovereign State.

In *Mahone v. Southern Tel. Co.,* 33 Fed. 702, at page 705, the Court said:

> "The lien of an attorney upon the fund he represents in court, as against his own clients, is so well established . . . that no hardship can be presumed to result, or ought to result, from the enforcement of it by the Courts."

Finally, we think this Court has already decided the question under discussion in accordance with the argument here made. On the 15th day of December, 1948, this Court approved a stipulation between Lee Arenas and John J. Taheny, Esq., his counsel of record in opposition to the allowance of attorneys' fees to appellees, allowing Mr. Taheny fees in the amount of $4,550.00 and expenses in the amount of $410.98, and by its order this Court impressed a lien upon all of the interest of Lee Arenas in the lands obtained for him in this suit, through the labor and skill of appellees, to secure the payment of said fees and expenses. [R. pp. 205-207.]

It seems clear that, if Mr. Taheny is entitled to a charging lien for services that in no way contributed to securing or preserving the lands in question, then surely more impelling equities require that appellees be allowed their fees and expenses of suit and that they be given a lien to secure the payment thereof upon the property they obtained for Arenas.

We believe the Court was fully justified in awarding fees to Mr. Taheny and in impressing a lien upon the allotted lands to secure the payment thereof. We believe that for similar but also for far more persuasive and impelling reasons the District Court had power to allow fees to appellees and to impress a lien upon the lands of Arenas to secure payment thereof.

III.

The District Court, in the Exercise of Its Equity Jurisdiction, Has Power to Order a Sale of the Property Allotted to Lee Arenas, or Such Portion Thereof as May Be Necessary, to Pay and Satisfy the Lien and Judgment Awarded to Appellees.

Since the District Court has jurisdiction and power to allow attorneys' fees in this suit in equity and to impress a lien upon the property recovered for Lee Arenas, it logically follows that said Court has power to enforce its decree by a sale of said property, or so much thereof as may be necessary. This logical conclusion is supported by the great weight of authority.

The rule is generally stated in 33 Am. Jur. 441 as follows:

> "It is settled beyond question that a court of equity is the appropriate tribunal for the enforcement of an equitable, as distinguished from a statutory or common-law, lien. Moreover, since equity has brought into existence liens unknown to the common law, it can enforce them by whatever means they will be rendered more efficacious in doing justice to the parties interested. A court of chancery may enforce an equitable lien on either an equitable or legal estate in lands, and if the law creates a lien upon a legal interest in realty, a similar lien may sometimes be declared and enforced in chancery upon equitable estates by analogy. . . . Lands, but not claims to lands, may be sold by a court of equity to discharge liens."

In 37 Corpus Juris 308 there appears a valuable statement of the rule in question, as follows:

> "The term 'lien' is used in equity in a broader sense than at law. And although it is difficult to define ac-

curately the term 'equitable lien', generally speaking, an equitable lien is a right, not recognized by law, and which a court of equity recognizes and enforces as distinct from strictly legal rights, to have a fund or specific property, or the proceeds, applied in full or in part to the payment of a particular debt or demand; a right of a special nature over property which constitutes a charge or encumbrance so that the property itself may be proceeded against in an equitable action, and either sold or sequestered, and its proceeds or its rents and profits applied on the debt or demand of the person in whose favor the lien exists. . . ."

It is further stated in the same text, at page 340:

"Except where there is a full and complete remedy at law, a court of equity has general jurisdiction to enforce liens, and in the absence of statute, *will foreclose them in obedience to the well settled rules of equity jurisprudence.* An equitable lien of course may be enforced in a court of equity, which in fact is the only proper tribunal for enforcing such a lien, regardless of what rights the lienor may have in a court of law. The usual mode of enforcing an equitable lien is by a decree for the sale of the property to which it is attached, and for the application of the proceeds to the payment of the debt secured by it, and such a lien will generally be enforced against all those holding an interest in the property to which it attaches."

Numerous federal cases are cited by the authors in support of the text. See,

Peck v. Jenness, 7 How. 612, 12 L. Ed. 841;

Vidal v. S. American Sec. Co., 276 Fed. 855;

Hotchkiss v. Nat'l City Bank, 200 Fed. 287, 291 (aff. 201 Fed. 664, 231 U. S. 50);

In re Nat'l Cash Register Co., 174 Fed. 579;
In re Maher, 169 Fed. 997;
In re Byrne, 97 Fed. 762;
Shakers Soc. v. Watson, 68 Fed. 730;
The Menominie, 36 Fed. 197;
Burdon etc. Co. v. Ferris Sugar Co., 78 Fed. 417;
King v. Thompson, 9 Pet. 204, 9 L. Ed. 102;
Riddle v. Hudgins, 58 Fed. 490.

The rule, as above stated, is recognized by the California decisions. These are summarized in 16 Cal. Jur. 353, as follows:

> "It is a recognized function of courts of equity to enforce liens, whether equitable or statutory, and whether created by law, or by express contract between the parties."

The authors cite many California cases in footnotes 17, 18, 19 (*id.* p. 353).

Pertinent here is the statement found in *Holbrook v. Phelan,* 121 Cal. App. 781:

> "The enforcement of liens is a well-recognized function of courts of equity. (Hibernia etc. Soc. v. London etc. Ins. Co., 138 Cal. 257 (71 Pac. 334); Kreling v. Kreling, 118 Cal. 413, 419 (50 Pac. 546).) The test of the jurisdiction of a court is ordinarily to be found in the nature of the case, as made by the complaint, and the relief sought. (Becker v. Superior Court, 151 Cal. 313, 316 (90 Pac. 689).)"

(A) To Follow the Position of the United States Would Do the Indians Claiming Allotments a Distinct Disservice.

It has been clearly established, *ante,* that a court of equity has power to require Arenas to pay his debt to appellees from the estate in the allotment secured for him by appellees by impressing an equitable lien thereon. This Court has already given such a lien in favor of an attorney who came into the case to contest the claims and rights of appellees. [R. pp. 205-207.]

If the allotments to Arenas are to be sold to satisfy these liens, then it is better that an unclouded title, rather than a restricted one, be given to the purchaser. This is so because more of his estate in the allotments will be required if the purchaser takes a clouded title.

It is thus obvious that the net result of the position taken by the Government, if followed to a final conclusion, is to do its Indian ward a distinct disservice.

Conclusion.

For the foregoing reasons, the judgment of the District Court should, in all respects, be affirmed.

Respectfully submitted,

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NO. 12046

In the United States Court of Appeals for the Ninth Circuit

LEE ARENAS, Appellant

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, Appellees

UNITED STATES OF AMERICA AND LEE ARENAS, Appellants

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, Appellees

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

REPLY BRIEF FOR THE UNITED STATES AND LEE ARENAS

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INDEX

Page

Argument ---- 1

I. The district court had no jurisdiction to impress a lien upon the trust patent allotments or to enforce such lien by appointing a receiver or ordering the sale of the property ---- 2

A. Introductory—The interest of the United States ---- 2

B. The decision below cannot be reconciled with the decision of this Court on the previous appeal (*United States* v. *Arenas*, 158 F. 2d 730) ---- 3

C. The United States in the 1894 Act as amended did not consent to imposition of a lien upon the property to secure payment of attorneys' fees ---- 4

D. The decision below is in direct contradiction to the limitations imposed by Congress upon alienation of the property 4

E. The cases relied upon by the court below do not support its assumption of jurisdiction in the instant case ---- 6

II. The district court had no jurisdiction to entertain a petition for allowance of attorneys' fees under the Act of 1894 as amended ---- 7

Conclusion ---- 12

CITATIONS

CASES:

Albrecht, Matter of, 132 Misc. 713, 230 N. Y. S. 543, aff'd 225 App. Div. 423, 233 N. Y. S. 383, aff'd 253 N. Y. 537, 171 N. E. 772 ---- 4

Anglin & Stevenson v. *United States*, 160 F. 2d 670 ---- 3

Berry v. *Root*, 148 F. 2d 945, certiorari denied, 326 U. S. 755---- 7

Central Railroad v. *Pettus*, 113 U. S. 116 ---- 9

Gerard v. *United States*, 167 F. 2d 951 ---- 2

German v. *Universal Oil Products Co.*, 77 F. 2d 70 ---- 9

Gillaspie, In re, 190 Fed. 88 ---- 8

Kyle, ex parte, 1 Cal. 331 ---- 10

Lasley v. *Tazewell Coal Co.*, 223 Ill. App. 462 ---- 5

Lea v. *Paterson Sav. Inst.*, 142 F. 2d 932 ---- 7

Louisville E & St. R. R. Co. v. *Wilson*, 138 U. S. 501 ---- 8

Mooney v. *Mooney*, 29 Misc. 707, 62 N. Y. S. 769 ---- 5

Paschal, In re, 10 Wall 483 ---- 9

Romaine v. *Chauncey*, 129 N. Y. 566, 29 N. E. 826 ---- 5

Sprague v. *Ticonic Bank*, 307 U. S. 161 ---- 8

Page

Trustees v. *Greenough*, 105 U. S. 527 ---- 8, 9
Turner v. *Woolworth*, 221 N. Y. 425, 117 N. E. 814 ---- 5
United States v. *Anglin & Stevenson*, 145 F. 2d 622, certiorari denied 324 U. S. 844 ---- 6, 8
United States v. *Arenas*, 158 F. 2d 730 ---- 3
United States v. *Equitable Trust Co.*, 283 U. S. 738 ---- 6, 8
United States v. *Guaranty Trust Co.*, 60 F. Supp. 103 ---- 4
Wagner v. *Sariotti*, 56 Cal. App. 2d 693, 133 P. 2d 430 ---- 10
Webster v. *Sweat*, 65 F. 2d 109 ---- 10
Young v. *United States*, 176 Fed. 612 ---- 7

STATUTES:

Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345 ---- 1, 2, 4, 6, 7
Act of November 24, 1942, 56 Stat. 1021, 25 U. S. C. sec. 373(a) ---- 3
California Code of Civil Procedure (Chase, 1947), sec. 1021 ---- 10

MISCELLANEOUS:

25 C. F. R.: sec. 221.20 ---- 10
sec. 221.21 . . . . ---- 11

In the United States Court of Appeals for the Ninth Circuit

No. 12046

LEE ARENAS, Appellant

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, Appellees

UNITED STATES OF AMERICA AND LEE ARENAS, Appellants

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, Appellees

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

REPLY BRIEF FOR THE UNITED STATES AND LEE ARENAS

ARGUMENT

The fundamental problem in this case is the meaning and effect to be given to the 1894 Act as amended. Although appellees mention that Act, analysis of their argument will show that no consideration is given to the various factors bearing upon the proper construc-

tion of that statute. Hence, appellees do not, in fact, controvert the contentions advanced in appellants' opening brief which demonstrate that the judgment below is plainly erroneous because it is not authorized by the 1894 Act and is directly contrary both to the provisions of that Act and to the policy of Congress as to restricted allotments. For clarity, the arguments advanced by appellees will be discussed under the appropriate headings of appellants' opening brief.

I

The District Court Had No Jurisdiction to Impress a Lien Upon the Trust Patent Allotments or to Enforce Such Lien by Appointing a Receiver or Ordering the Sale of the Property

A. *Introductory—The interest of the United States.* —In our opening brief, pp. 13-15, we have pointed out that although the Indian is the beneficial owner of restricted allotted land, the United States is vitally interested therein and, in fact, in many instances its interest predominates over that of the Indian owner. The interest of the United States is of a governmental nature going far beyond that of the ordinary trustee or guardian whose only duty is to protect the rights of his beneficiary or ward. While making no specific mention of this fact, appellees assert (Br. 21) that the United States is interested in the land "but only as a trustee for Arenas" and elsewhere (Br. 9) it is said that this case "is a matter solely between solicitor and client." But, we submit, the interest of the United States may not thus be disregarded.

That the interest of the United States here is much different from that of the ordinary trustee is further illustrated by the fact that, if the trust patentee should die without heirs, the land would escheat to the tribe and become subject to administration by the United States. *Gerard* v. *United States,* 167 F. 2d 951, 954

(C.C.A. 9, 1948). And, carrying the possibilities further, if the tribe were no longer in existence, the land would be held in trust by the United States for such Indians, within the state where the land is located, as the Secretary of the Interior may designate. Act of November 24, 1942, 56 Stat. 1021, 25 U.S.C. sec. 373(a). Congress could, of course, terminate the latter trust arrangement and provide for escheat to the United States. Hence, it is increasingly clear that any attempt to impress a lien upon the trust patent allotments is a suit against the United States. Cf. *Anglin & Stevenson* v. *United States,* 160 F. 2d 670, 673 (C.C.A. 10, 1947).

B. *The decision below cannot be reconciled with the decision of this Court on the previous appeal (United States* v. *Arenas, 158 F. 2d 730).*—On the last prior appeal in this litigation, this Court agreed that the 1894 Act did not authorize the imposition of liability for costs or other expenses of litigation against the Government. *United States* v. *Arenas,* 158 F. 2d 730, 753 (C.C.A. 9, 1946). But, especially in view of the obligation of the United States to convey a fee title "free of all charge or incumbrance whatsoever" at the end of the trust period, it is obvious that the imposition of a lien upon the allotments is an attempt to impose the costs of the litigation, including attorneys' fees, against the United States. As this Court has already agreed, this cannot be done.

Appellees assert (Br. 21-22) that there is no inconsistency between this Court's decision and the judgment in the instant case. This assertion is apparently based upon two assumptions: (1) that the United States is interested only as trustee and (2) that the judgment is not in terms against the United States. Both of these assumptions are wrong. As we have shown the United States has a governmental interest

in the property. And, as pointed out in our opening brief (pp. 16-17) an attempt to impose a lien for charges on such land is an attempt to impose liability upon the United States. Cf. *United States* v. *Guaranty Trust Co.,* 60 F. Supp. 103, 105 (S.D. N.Y. 1945); *Matter of Albrecht,* 132 Misc. 713, 717, 230 N.Y.S. 543 (N.Y. 1928), aff'd 225 App. Div. 423, 233 N.Y.S. 383 (1929), aff'd 253 N.Y. 537, 171 N.E. 772 (1930).

C. *The United States in the 1894 Act as amended did not consent to imposition of a lien upon the property to secure payment of attorneys' fees.*—In point II appellees argue (Br. 23-26) that the court had jurisdiction to impose a lien upon the allotted lands to secure the payment of attorneys' fees, and in point III (Br. 27-30) they contend that therefore the court had power to sell the property. The error of these arguments is apparent from the fact that nowhere in these two points, even in the headings, which do not conform to appellees' questions presented (Br. 3), is the 1894 Act as amended cited or discussed. Appellees simply assume that if the 1894 Act conferred jurisdiction to allow attorneys' fees, it likewise conferred jurisdiction to impose a lien therefor on the property and to enforce that lien. This assumption is unsupportable. As we have shown (opening brief, pp. 17-21) it is contradicted by the language of the Act itself, the well-settled principles relating to construction of statutes by which the Government consents to be sued and the policy of Congress in relation to attorneys' fees.

D. *The decision below is in direct contradiction to the limitations imposed by Congress upon alienation of the property.*—Here again appellees' argument rests completely on the assumption that if the court had jurisdiction to allow attorneys' fees, it had power to impose a lien upon and to sell the allotted land. Appellees claim that the Government's brief "dwells

at great length upon technicalities of law, but ignores the equities underlying appellees' right to fees and expenses made necessary by its breach of fiduciary duty" (Br. 5). It is, to say the least, surprising to find the basic policy of Congress in Indian affairs—that lands allotted to Indians shall not be alienated in any manner—which has been expressed in the plainest language and most sweeping terms in statutes applicable to this land, characterized as "technicalities of law." It is abundantly clear, and appellees do not deny, that as pointed out in detail in our opening brief (pp. 21-26), the judgment below results in nullification of the restrictions which have heretofore been zealously enforced by the courts.

Even in instances where there is no express statutory limitation upon judicial power, courts of equity will not enforce liens for attorneys' fees in a manner contradictory to declared public policy. For example, they will not aid an attorney to obtain his compensation from an award of alimony (*Turner* v. *Woolworth,* 221 N.Y. 425, 429-430, 117 N.E. 814 (1917); cf. *Romaine* v. *Chauncey,* 129 N.Y. 566, 573-575, 29 N.E. 826 (1892)); a dower interest (*Mooney* v. *Mooney,* 29 Misc. 707, 62 N.Y.S. 769 (N.Y. 1899)); or an award under a Workmen's Compensation Act (*Lasley* v. *Tazewell Coal Co.,* 223 Ill. App. 462 (1921)). In *Turner* v. *Woolworth,* 221 N.Y. 425, 429-430, 117 N.E. 814 (1917), it is well stated:

> The purpose of alimony is support. Equity, which creates the fund, will not suffer its purpose to be nullified. * * * In such circumstances, equity, confining the fund to the purposes of its creation, declines to charge it with liens which would absorb and consume it.

In view of the express congressional provisions with respect to the inviolability of the lands here involved,

the same result, with all the more reason, should apply here. The purpose of allotments is to support and bring about the civilization of the Indian. Certainly there can be no equity in the liquidation of the property which this suit was intended to secure for Lee Arenas. The entire purpose of the 1894 Act as amended and of this suit would thereby be nullified.

E. *The cases relied upon by the court below do not support its assumption of jurisdiction in the instant case.*—Like the court below appellees rely heavily upon *United States* v. *Equitable Trust Co.,* 283 U.S. 738 (1931) and *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C.C.A. 10, 1944). These decisions were discussed in our opening brief which pointed out (pp. 26-29) the reasons why neither of them lend support to a conclusion that by the 1894 Act, wherein Congress authorized Indians to sue to establish their rights to trust allotments, the restrictions imposed for the benefit of the Indians were impliedly relinquished. Appellees' only answer is the bare assertion (Br. 16), "In the *Equitable Trust* case the consent of the United States necessary for allowance of fees and expenses was *implied; here consent is expressly given by statute.* (25 U.S.C.A. Sec. 345)". There is no such consent in the 1894 Act as amended.[1]

---

[1] Appellees' suggestion (Br. 26) that this Court has already decided the question when it issued its order fixing the fee of Mr. John J. Taheny, including a provision imposing a lien upon the allotted lands to secure such payment (R. 205-207), lacks merit since the order was entered without notice to the United States and, so far as we are advised, without consideration of the present problem. The United States has filed a motion for modification of this order by deleting therefrom all reference to the lien to secure payment of attorney's fees.

II

The District Court Had No Jurisdiction to Entertain a Petition for Allowance of Attorneys' Fees Under the Act of 1894 as Amended

Ignoring the limited scope of the 1894 Act, appellees contend (Br. 6-22) that the district court had the power to make an allowance for attorneys' fees and expenses in the instant case by virtue of its historic equity jurisdiction as invoked by the 1894 Act, the assertion being that in every equity suit the court necessarily has the power to fix fees between attorney and client. But it is perfectly clear that the equitable principles relied upon by appellees have no application here.

In the first place, complete reliance is placed upon the "historic equity jurisdiction" of the federal courts, or "that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery." (Br. 8). The obvious weakness in appellees' argument is that a suit to determine a right to an allotment under the 1894 Act is no part of such "historic equity jurisdiction." *Young* v. *United States,* 176 Fed. 612, 614 (C.C. W.D. Okla. 1910). Both the sovereignty of the defendant and the nature of the relief negative any contention to the contrary. Thus, the jurisdiction of the court below, though equitable in nature, was purely statutory and limited to that specified in the statute. Appellees' contention (Br. 20) that if a court is granted any equity jurisdiction it necessarily is unlimited is plainly erroneous. See Government's opening brief, pp. 17-21, 30-31. Hence, it is plain that the power to allow attorney fees in cases arising under the historic equity jurisdiction does not support the allowance of such fees in a suit under the 1894 Act. Cf. *Lea* v. *Paterson Sav. Inst.,* 142 F. 2d 932, 933 (C.C.A. 5, 1944); *Berry* v. *Root,* 148

F. 2d 945, 946-947 (C.C.A. 5, 1945), certiorari denied 326 U.S. 755. The district court's jurisdiction in the instant case was limited to that prescribed in the 1894 Act and appellees have utterly failed to show how that act conferred any power to determine attorney fees. In fact, it does not.

Secondly, appellees claim that the trial court had jurisdiction to allow attorneys' fees as part of its "historic equity jurisdiction" citing (Br. 8-10) *Sprague* v. *Ticonic Bank,* 307 U. S. 161 (1939); *Trustees* v. *Greenough,* 105 U. S. 527 (1881) and *Louisville E & St. R. R. Co.* v. *Wilson,* 138 U. S. 501 (1891). But as fully explained in the *Sprague* case, these decisions represent applications of the principle that when a plaintiff has successfully recovered a fund in which other persons share the court may properly include the plaintiff's attorney fees in the costs and expenses of litigation which are awarded to the plaintiff. No such situation is presented here. Lee Arenas is the sole beneficiary of the judgment awarded against the United States. Thus, appellees are seeking to enlarge the historic jurisdiction of equity to award attorneys' fees so as to embrace any suit in which the plaintiff recovers money or property. But, "Courts of equity should never attempt to fix the compensation due the attorney in any ordinary litigation. The law courts are open to enforce this class of contracts in action of debt or assumpsit just as they are open to enforce all other contracts for services rendered, whether express or implied." *In re Gillaspie,* 190 Fed. 88, 90 (N. D. W. Va. 1911).

Neither *United States* v. *Equitable Trust Co.,* 283 U. S. 738 (1931) nor *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C. C. A. 10, 1944), certiorari denied 324 U. S. 844, support the broad view advocated by appellees. The *Anglin & Stevenson* decision was

expressly based on the rule discussed above that "where an attorney recovers a fund for the benefit of his client and others, those benefited thereby become obligated to pay the cost of the recovery and preservation of the fund, including a reasonable 'between solicitor and client fee'." 145 F. 2d at p. 624. The *Equitable Trust* case was based on a slightly different application of the same fundamental principle. There the suit was brought by the next friend of Jackson Barnett who was legally incompetent and the recovery inured to the benefit of both Barnett and the United States. See *Trustees* v. *Greenough,* 105 U. S. 527, 532-333 (1881), relied upon in the *Equitable Trust* case. Thus, all of the cases cited by appellees were situations where the person actually benefited was required to pay his share of the costs including attorneys' fees. None of them involved, as here, an attempt by an attorney to recover fees against his client who was the sole beneficiary of the judgment. The mere fact that the client is an Indian does not justify expansion of the equity rule. As appellees emphasize (Br. 10-11) Lee Arenas was perfectly competent to contract with them and no reason appears for treating him differently from any other party litigant.[2]

Appellees also rely (Br. 23-24) on decisions holding that an attorney has an equitable lien for his fees upon the product of his labor. But such a lien does not arise from the historic equity jurisdiction. Instead, it exists only when the law of the particular state recognizes this means of enforcing the attorney's contract. *In re Paschal,* 10 Wall. 483, 495-496 (1870); *Central Railroad* v. *Pettus,* 113 U. S. 116, 127 (1885); *German* v. *Universal Oil Products Co.,* 77 F. 2d 70, 72

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[2] It should be noted that Jackson Barnett was not only a restricted Indian but was legally incompetent and hence could not make a contract.

(C. C. A. 8, 1935). The first case cited by appellees on this point (Br. 23) *Webster* v. *Sweat,* 65 F. 2d 109 (C. C. A. 5, 1933) states (p. 110), "Federal courts, although they recognize no common-law lien in favor of attorneys, give effect to the laws of states in which they are held." Nevertheless, appellees treat the matter as if the rule was one of universal application and refer to cases decided by many state courts, omitting, however, any reference to California law.

In *Wagner* v. *Sariotti,* 56 Cal. App. 2d 693, 697, 133 P. 2d 430, 432 (1943) the California law was summarized as follows:

> In this state an attorney has neither a retaining nor charging lien for compensation on a judgment secured by his services in the absence of a contract containing an agreement for a lien.

See also *Ex parte Kyle,* 1 Cal. 331 (1850); California Code of Civil Procedure (Chase, 1947), sec. 1021. Appellees make no claim that such a contract has been made and it is clear there is no such contract. The contract found by the district court to be in force (R. 41-42, 187-188) cannot in any way be construed as providing that appellees were to look to the judgment as security for their fee. It merely provides that Arenas will "pay my said Attorneys upon a quantum meruit basis for services rendered." Indeed, for all that appears Arenas was obligated to make payment for services whether or not the suit was successful. Moreover, the contract, drafted by appellees themselves (R. 136-137), expressly negatives any idea that they were to have recourse to the allotments for their fees and expenses by providing that the payment of compensation was to be "subject to the rules and regulations of the Department of the Interior" (R. 187). One of such regulations, 25 C. F. R. sec. 221.20, provides:

> Debts of Indians will not be paid from funds under the control of the United States, including individual Indian moneys, unless previously authorized by the Superintendent except in emergency cases necessitating medical treatment or in the payment of last illness or funeral expenses as elsewhere herein provided and any other exceptional cases where specific authority is granted by the Indian Office.

Another, 25 C. F. R. sec. 221.21, provides:

> Persons who extend unauthorized credit to Indians do so at their own risk and must look to the debtors themselves for payment. However, all Indians should be urged to pay their just and legitimate debts so far as they may be able. * * *

Thus, by their contract appellees agreed to look to the personal credit of Arenas for compensation without recourse to restricted property.[3] Clearly, they now have no standing to demand payment from the trust patent allotments, but must look to the personal funds of Arenas. See App. Br. 10-11.

---

[3] Appellees as attorneys would be presumed to know of the regulations above quoted. That they had actual knowledge is indicated by their submission of the superseded contract (R. 173-182) to the Department of the Interior for approval, and the reply from the Department (R. 185-186). Appellees chose to ignore the regulations (R. 162).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed with directions to dismiss the petition for allowance of attorney fees.

Respectfully,

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July 1949.

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No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

TRANSCRIPT OF RECORD

Appeal From the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Page

Appeal:

- Designation of Record on (Court of Appeals) 23
- Notice of 20
- Statement of Points Upon Which Appellant Intends to Rely and Designation of the Record Necessary for Consideration of Such Points (Court of Appeals) 22

Appearance on Motion to Dismiss 14

Certificate of Clerk 21

Complaint for Damages 2

Designation of Record on Appeal (Court of Appeals) 23

Judgment of Dismissal for Lack of Jurisdiction 19

Memorandum Opinion 15

Motion to Dismiss 13

Names and Addresses of Attorneys 1

Notice of Appeal 20

Opinion, Memorandum 15

Statement of Points Upon Which Appellant Intends to Rely and Designation of the Record Necessary for Consideration of Such Points (Court of Appeals) 22

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*Page number appearing at foot of Certified Transcript.

District Court of the United States
Southern District of California
Central Division

Civil No. 8198-BH

EARLE C. ANTHONY, INC.,

Plaintiff,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD., a corporation,

Defendants.

COMPLAINT FOR DAMAGES
$150,000.00

The Plaintiff, Earle C. Anthony, Inc., complains of the Defendants and for cause of action alleges:

I.

This action is of a civil nature and arises under the First Amendment to the Constitution of the United States; the Fourteen Amendment to the Constitution of the United States, Sections 1 and 5; Article I, Section 8, Cl. 1, 3 and 18, of the Constitution of the United States; Act 1870, 14 Stat. 27 (as amend.), U. S. C. A., Title 8, Sec. 41; the Act of 1871, 17 Stat. 13, U. S. C. A., Title 8, Secs. 43 and 47 (3); the Act of 1875, 18 Stat. 470 (as amend.), U. S. C. A., Title 28, Sec. 41 (1); and Act 1911, 36 Stat. 1092 (as amend.), U. S. C. A., Title 28, Secs. 41 (8), (12), (13) and (14) as hereinafter more fully appears and the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). [2]

II.

At all times herein mentioned Plaintiff, Earle C. Anthony, Inc., was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California and the owner and operator of a radio broadcasting station in the City of Los Angeles, State of California, with its transmitter located in Orange County, California, pursuant to a license granted in that behalf by the Federal Communications Commission. Said broadcasting station is known by its call letters K.F.I. Plaintiff has invested in station KFI and its facilities sums of money in excess of $1,500,000.00 and has during the past twenty-five years built up one of the largest, most numerous and most extensive listening publics of any radio station in the western states of the United States. Plaintiff is engaged in radio broadcasting for profit. Plaintiff's radio station has a transmission power of 50 kilowatts, and its radio broadcast programs are heard in Arizona, Nevada and other Western states of the United States and in Mexico, and by reason thereof Plaintiff in its radio business is engaged in interstate and foreign commerce. For convenience of reference, Plaintiff is sometimes hereinafter referred to as KFI.

III.

At all times herein mentioned Defendant, Kenneth E. Morrison, was, and now is, a Judge of the Superior Court of the State of California in and for the County of Orange. Defendant resides in the County of Orange, State of California.

IV.

Plaintiff is informed and believes and therefore alleges that at all times herein mentioned Defendant, the Voice

of the Orange Empire Inc., Ltd., hereinafter called KVOE, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of California and is the owner and operator of [3] a radio broadcasting station located in the City of Santa Ana, County of Orange, State of California, with its transmitter located in Orange County, California, pursuant to a license granted in that behalf by the Federal Communications Commission, which broadcasting station is known by its call letters KVOE.

V.

Stations KFI and KVOE each broadcast news, entertainment, educational and similar type programs and are competitors in the field of intrastate, interstate and foreign radio broadcasting. The chief asset of each of said stations is its listening audience good will and each station endeavors to secure as large a listening audience as possible. One of the means of attracting a listening radio audience is the broadcast of news flashes of current events of a general public interest, promptly and accurately. KFI has always and consistently endeavored to establish in its listening audience confidence in the fact that if a listener will remain tuned to KFI such listener can anticipate that if there is a news event of wide public interest, almost immediately after the happening of such event there will be a radio news "flash" reporting said event broadcast over KFI, and that such a flash will be both current and accurate. Through its twenty-five years of broadcasting KFI has successfully established a reputation for prompt and accurate news reporting. The amount of income realized by stations KFI and KVOE from the operation of their respective radio stations is essentially conditioned upon the numerical size

of their respective listening audiences and the degree of success of KFI in attracting and maintaining a listening audience is in a large measure proportional to its successful competition with the defendant station as well as other competitors in the field of radio broadcasting. The amount of income derived by KFI has a direct ratio to the relative size of KFI's listening audience as compared with its competitors. [4]

VI.

During the year of 1947 widespread public interest developed as to the cause or causes of the deaths of Walter E. Overell and Buelah A. Overell, husband and wife, who were killed aboard their yacht in the harbor at Newport Beach, California, on or about March 15, 1947. There was wide speculation and conjecture between various members of the press and radio, between State authorities and private individuals, on this subject. Public interest was stimulated by an apparent controversy between different State and County officials charged with the investigation and prosecution of crime in the State of California. Public interest was further stimulated when Louise Overell, the daughter of the said decedents, and George R. Gollum, also known as Bud Gollum, were charged with the murder of said decedents. Louise Overell and George R. Gollum were subsequently tried for said alleged murders in Santa Ana, California, in the Superior Court of the State of California in and for the County of Orange, by a jury before and in the Court of Defendant, Kenneth E. Morrison. The trial which commenced on May 26, 1947, lasted in excess of nineteen weeks and the course and developments of the trial were summarized daily and were reported at great length and in detail in the press and on the radio and were closely

followed by the general public throughout the United States and particularly in the western states of the United States, receiving great public attention and interest.

VII.

Defendant KVOE was given permission by Defendant Kenneth E. Morrison, acting as Judge of said Superior Court, to locate a microphone in the courtroom of his said court and to broadcast the trial from the courtroom, and did for nineteen weeks during the progress thereof broadcast the daily events of the trial. Said Defendant Kenneth E. Morrison also granted to Defendant KVOE [5] permission to broadcast the jury's verdict from said courtoom when read by the foreman at the conclusion of said trial.

VIII.

By October 4, 1947, the case had been submitted to the jury for its verdict. On said day KFI made several announcements to its listeners that it would provide "on the spot" coverage and would broadcast the results of the verdict through its facilities to be located at Santa Ana, California, as soon as it was read. Pursuant to the foregoing announcement KFI dispatched a sound truck, a news reporter and radio engineers to Santa Ana for the purpose of transmitting by radio the jury's verdict to its broadcasting station in Los Angeles. KFI's news reporter, on arriving in Santa Ana, California, requested of Defendant Kenneth E. Morrison, as Judge of the said Superior Court, that he grant permission to KFI to broadcast the verdict from his said courtroom on the same terms and conditions that he was granting this permission to station KVOE. Defendant Kenneth E. Morrison arbitrarily and capriciously refused to grant

KFI the same rights to broadcast from said courtroom that he was granting to KVOE and willfully, intentionally, invidiously and purposefully denied to KFI this equal protection and application of the law requested by KFI, and then and there stated to said reporter that he, Kenneth E. Morrison, as Judge of said Superior Court was granting this permission exclusively to KVOE. Said action and denial by said Defendant deprived KFI of, and prevented it from exercising and availing itself of, its property and its constitutional rights.

IX.

Defendant Kenneth E. Morrison justified his refusal to said KFI reporter on the basis that as a Judge, he had authority to control his courtroom and that he could deny to KFI the right to broadcast and could grant the right to any other station that he saw fit. Station KFI renewed its said request to Defendant [6] Kenneth E. Morrison for equal broadcasting rights with KVOE to broadcast the verdict from the courtroom on three separate occasions before the verdict of the jury was read on October 5, 1947, but Defendant Kenneth E. Morrison refused and continued to refuse to KFI the same rights to broadcast from the courtroom that he was giving to Defendant KVOE. The verdict was read on October 5, 1947, in the courtroom of Kenneth E. Morrison, and Defendant KVOE, pursuant to the permission granted it by Defendant Kenneth E. Morrison, did broadcast the verdict to the public at large from the courtroom. Defendant Kenneth E. Morrison's acts were done under the color of state law, custom and usage and his acts willfully, intentionally, invidiously and purposefully denied to KFI the equal protection of the laws, of its property without due process of law, of the right to the freedom of

press and its right to engage in interstate and foreign commerce as guaranteed to it by the Constitution of the United States. KFI had done nothing that would justify Defendant Kenneth E. Morrison to believe that if admitted to his said courtroom it would create a disturbance or do any act or acts that would interfere with the orderly conduct of the trial. In this connection KFI requested of said Defendants Kenneth E. Morrison and KVOE permission to connect its microphone into the wires connecting that of KVOE, which would have been done outside the courtroom and would have eliminated the necessity of KFI's microphone being brought into the courtroom, which permission was denied by said Defendants Kenneth E. Morrison and KVOE without right.

X.

Upon being advised by Defendant Kenneth E. Morrison that KFI would not receive the same rights and privileges extended to KVOE with reference to the broadcast of the verdict, KFI requested of Kenneth E. Morrison as an alternative, that it be allowed to broadcast the verdict from a location approximately 300 feet from [7] the courtroom on a bridge connecting the Court House to an adjacent building. Defendant Kenneth E. Morrison advised KFI that that location was entirely without his jurisdiction and that so far as he was concerned the broadcast could be made from this bridge. Pursuant to the foregoing authority and with the express approval of the custodian of the Court House building, KFI set up its microphone on the bridge and made all necessary hookups with its sound truck to broadcast said verdict to its broadcasting station in Los Angeles. Approximately simultaneously with the reading of the verdict one Robert Carlton, a Court House janitor, acting

under the express orders of Defendant Kenneth E. Morrison, as said Judge of the Superior Court, seized possession of the microphone on the bridge, thereby preventing KFI from making this broadcast, and with the aid of two deputy sheriffs placed Plaintiff's engineer, who was in charge of the microphone, in restraint.

XI.

In addition to the special and exclusive rights granted to station KVOE, Defendant Kenneth E. Morrison granted special and exclusive permission to Station of the Stars, Inc., which corporation operates a radio station in Los Angeles County, California, using the call letters KMPC, to locate its broadcasting facilities in the chambers of Defendant Kenneth E. Morrison adjoining the courtroom and to connect said facilities with those of Defendant KVOE which had been set up in the courtroom of Defendant Kenneth E. Morrison, thereby enabling Station of the Stars, Inc. to relay the KVOE broadcast to its audience pursuant to an agreement between it and KVOE. Station of the Stars, Inc. is for convenience sometimes hereinafter referred to as KMPC.

XII.

By this suit and proceedings, Plaintiff, KFI, seeks to redress the deprivation by Defendants Kenneth E. Morrison and KVOE, under color of statute, regulation, custom and usage, of [8] Plaintiff's rights, privileges and immunities secured to it by the laws of the United States and guaranteed to it by the Constitution of the United States.

XIII.

These arbitrary and discriminatory acts of Defendant Kenneth E. Morrison were willfully, intentionally, invidiously and purposefully calculated to and did give to Defendant KVOE and KMPC a preferred position with reference to the coverage of the trial so as to enable Defendant KVOE and KMPC to scoop KFI on the broadcast of the jury's verdict. Said arbitrary and discriminatory acts of Defendant Kenneth E. Morrison were designed to and did deny to KFI its right to the equal protection of the law, to deprive KFI of its property without due process, and to deny to KFI the freedom of the press and its rights to engage in interstate and foreign commerce, all to its damage in the sum of $150,000.00.

As and for a Second and Separate Cause of Action, Plaintiff Alleges as Follows:

I.

Plaintiff refers to the allegations set forth in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XIII of its first cause of action and by this reference makes the same a part hereof as though set forth in full.

II.

During the pendency of said Overell trial and before the jury had returned its verdict, KFI requested on several occasions of Defendant Kenneth E. Morrison the same broadcasting privilege as given to Defendant KVOE to broadcast the verdict from the courtroom and requested equal rights with KVOE to make this broadcast from the courtroom. Defendant Kenneth E. Morrison willfully, intentionally, invidiously and purposefully refused to KFI these same rights that he was extending as Judge of the said Superior Court to Defendant KVOE and

granted as an alternative to the [9] rights and privileges granted to KVOE the right to make the broadcast providing consent was first obtained from KVOE. KFI on several occasions prior to the reading of said verdict requested Defendant KVOE to relinquish the exclusive rights and privileges being granted to it by Defendant Kenneth E. Morrison. Defendant KVOE, exercising the power of exclusion granted to it by Defendant Kenneth E. Morrison as Judge of the Superior Court willfully, intentionally, invidiously and purposefully refused to allow KFI to make the broadcast from the courtroom or to connect with its transmission line outside of the courtroom. Said Defendants Kenneth E. Morrison and KVOE jointly and severally continued to refuse to KFI the equal right with KVOE to broadcast from the courtroom. Plaintiff is informed and believes and on information and belief alleges that Defendants Kenneth E. Morrison and KVOE willfully, intentionally, invidiously and purposefully conspired to deprive and did deprive KFI of its right to freedom of the press, equal protection of the laws, its property without due process of law and its right to engage in interstate and foreign commerce as guaranteed to it by the Constitution of the United States.

III.

Plaintiff is informed and believes and on information and belief alleges that Defendant, KVOE, with the consent and approval of Defendant Kenneth E. Morrison did authorize KMPC to set up its equipment in the chambers of defendant Kenneth E. Morrison, which are immediately adjacent to the courtroom, and permitted KMPC to instantaneously relay the KMPC courtroom broadcast to the news room of KMPC, and that when the verdict was read Defendants KVOE and KMPC by virtue of

the foregoing arrangement were able to and did simultaneously broadcast the verdict over their stations. Defendants KVOE and KMPC were thereby able to advertise and did advertise that they were making and had the only right to make the exclusive broadcast of the jury's verdict from the courtroom of [10] Defendant Kenneth E. Morrison. Thus Defendant KVOE was able to capitalize and did capitalize on the benefits derived as a result of the conspiracy to deprive KFI of an equal right to broadcast to the public at large.

IV.

The direct and intentional result of the willful, intentional, invidious and purposeful conspiracy of Defendants Kenneth E. Morrison and KVOE was to deny to KFI its right to freedom of press, the equal protection of the law, its property without due process of law, and its right to engage in interstate and foreign commerce, causing KFI to suffer damage to its good will, to lose the confidence of its listening public and other damages, all to its detriment in the sum of $150,000.00.

Wherefore, Plaintiff prays judgment against the Defendants and each of them in the sum of $150,000.00, and for such other and further relief as may be just.

OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE
EUGENE OVERTON
DONALD H. FORD
Eugene Overton

Attorneys for Plaintiff [11]

[Verified.]

[Endorsed]: Filed May 11, 1948. Edmund L. Smith, Clerk. [12]

[Title of District Court and Cause]

NOTICE OF MOTION TO DISMISS

(1) For Failure to State a Claim Upon Which Relief Can Be Granted, and

(2) For Lack of Jurisdiction

To the Plaintiff Above Named and to Overton, Lyman, Plumb, Prince & Vermille, 735 Roosevelt Building, Los Angeles 14, California, Its Attorneys; and to Whomsoever It May Concern:

You and Each of You Will Please Take Notice that The Voice of the Orange Empire Inc., Ltd., a California corporation, will on Monday, June 28th, 1948, at 10:00 o'clock a. m. of said day, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Ben Harrison, Judge of the above named Court, in the Federal Building, Los Angeles, California, move the above named Court for an order dismissing the Complaint on file herein, as to the Defendant, The Voice of the Orange Empire Inc., Ltd., a corporation, and for an order dismissing the above entitled action as to the Defendant, The Voice of the Orange Empire Inc., Ltd., a corporation. [13]

Said motions will be made upon the following grounds:

1. That the Complaint fails to state a claim upon which relief can be granted as against the Defendant, The Voice of the Orange Empire Inc., Ltd., a corporation.

2. That the Court has no jurisdiction to enforce the liability alleged in the Complaint as against the Defendant, The Voice of the Orange Empire Inc., Ltd., a corporation.

Said motions will be based upon (a) the Plaintiff's Complaint entitled "Complaint for Damages $150,000.00", and (b) the Memorandum of Points and Authorities served and filed herewith.

R. M. CROOKSHANK

Attorney for Defendant, The Voice of the Orange Empire Inc., Ltd. [14]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 11, 1948. Edmund L. Smith, Clerk. [15]

[Title of District Court and Cause]

APPEARANCE ON MOTION TO DISMISS

To the Plaintiff Above Named and to Overton, Lyman, Plumb, Prince & Vermille, Its Attorneys:

You and Each of You Will Please Take Notice that pursuant to authority heretofore granted by the court, the defendant Kenneth E. Morrison does hereby join with the defendant The Voice of the Orange Empire, Inc., Ltd., a corporation, in its motion to dismiss the complaint of the plaintiff and upon the grounds stated in said motion.

Pursuant to said permission, defendant Kenneth E. Morrison serves and files herewith his memorandum of points and authorities.

OTTO A. JACOBS

Attorney for Defendant Kenneth E. Morrison [16]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 8, 1948. Edmund L. Smith, Clerk. [17]

[Title of District Court and Cause]

MEMORANDUM OPINION

In this action plaintiff seeks to recover damages for infringement of its civil rights in violation of the Fourteenth Amendment and 8 U. S. C. A., Sections 43 and 47. Defendants have moved to dismiss the complaint on two grounds, namely, (1) for failure to state a claim upon which relief can be granted and (2) for lack of jurisdiction.

The complaint in substance alleges that the defendant Morrison as presiding judge during a sensational murder trial conducted in Orange County permitted the defendant broadcasting company to broadcast the trial from his courtroom during its progress, but denied the same priviledge to the plaintiff broadcasting company, all to its damage in the sum of $150,000.00.

The plaintiff contends that the issue in this case is: "Has a Judge of a court, while acting in his official capacity as such, [18] the right to grant special privileges in his courtroom to one news gathering agency to the exclusion of the others?"

To me the issue is: Does such action present a Federal question? I think not.

Plaintiff admits in its brief that there is no legal right (at least in the year 1948) permitting broadcasting from a courtroom during the course of a trial, but contends that once the defendant judge permitted the defendant broadcasting company that privilege, the denial of the same privilege to the plaintiff was a denial of its civil rights, thereby enabling it to seek redress in this court.

It is my understanding that only rights or privileges granted, secured or protected by the Federal Constitution and laws of the United States can be made the basis of an action under the Civil Rights Statutes. Mitchell v. Greenough, 100 F. (2d) 184-5 (9th Cir.), and cases therein cited. No such right is disclosed in the pleadings or cited by counsel.

Plaintiff states in its brief: "Obviously, no Judge should permit his courtroom to be filled with innumerable microphones, technicians and wires; in fact the writer of this memorandum believes miscrophones, photo-flash lights, etc., should not be allowed in a courtroom. But once a Judge opens his courtroom to radio broadcasting, it is our contention that he, as a representative of the State, is obligated to see that no one gets a special privilege, a valuable property right, not open to everyone similarly situated. Above all officials, Judges are charged with the duty to act fairly and impartially."

To follow plaintiff's argument to its natural conclusion, it is its theory that the defendant Morrison did something which he should not have done but as long as he did it, the plaintiff had a vested right in having the wrong repeated.

In Love v. Chandler, 124 F. (2d) 785-786 (8th Cir.), the court said: [19]

> "The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (United States v. Mosley, 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355), did not have the effect of taking into federal control the protection of private rights against invasion by individuals. Hodges v. United States, 203 U. S. 1, 14-20, 27 S.

> Ct. 6, 51 L. Ed. 65; Logan v. United States, 144 U. S. 263, 282-293, 12 S. Ct. 617, 36 L. Ed. 429. The protection of such rights and redress for such wrongs was left with the States."

The following language is used in Snowden v. Hughes, 321 U. S. 1, 11-12:

> "It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.
>
> A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."

In the same case Mr. Justice Frankfurter in his concurring opinion summed up the present problem when he stated:

> "It is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is pro tanto the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court."

For a further discussion of rights protected under our Civil Rights Statutes see 11 C. J., p. 802; 14 C. J. S. 1161; The Civil Rights cases, 109 U. S. 3, 3 S. Ct. 18; U. S. v. Classic, 313 U. S. 299; 40 Harvard Law Review 969.

Under the law of California, the defendant Morrison had control of his courtroom and it was a matter of discretion whether he would permit any broadcasting from

his courtroom. Under such discretion he could extend permission to one, ten or one hundred broadcasting stations and I cannot see by any stretch of the imagination wherein even an abuse of discretion can be made the basis of an action of which the Federal judiciary has any jurisdiction. I cannot see under what authority a Federal court can step in and control who shall or shall not [20] be permitted to broadcast from the courtroom of a State court. If the practice of law is not a privilege granted by the Federal court or laws, how can it be construed that the right to broadcast from a courtroom is a privilege granted under the supreme law of the land? Mitchell v. Greenough, 100 F. (2d) 184-5.

I realize the Civil Rights Statutes are very flexible and must be used and applied to meet changing conditions. It may be, some day, that broadcasting and television may be considered a vested right of news gathering agencies but the flexibility of my mind cannot comprehend that such unusual privileges have thus far jelled into a right.

It is my opinion that the plaintiff has failed to state a cause of action over which this court can entertain jurisdiction.

Defendants are entitled to judgment of dismissal.

Dated: This 19 day of July, 1948.

BEN HARRISON
Judge

[Endorsed]: Filed Jul. 19, 1948. Edmund L. Smith, Clerk. [21]

In the United States District Court
Southern District of California
Central Division

No. 8198-BH Civil

EARLE C. ANTHONY, INC.,

Plaintiff,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD., a corporation,

Defendants.

JUDGMENT OF DISMISSAL FOR LACK OF JURISDICTION

On the 28th day of June, 1948, this cause came before the court for hearing of Motion to Dismiss by defendant, The Voice of the Orange Empire, Inc., Ltd., and Eugene Overton, Esq. and D. H. Ford, Esq. appeared as counsel for the plaintiff, and R. M. Crookshank, Esq. appeared as counsel for said defendant, and Otto A. Jacobs, Esq. appeared as counsel for the defendant, Kenneth E. Morrison; and on motion, the defendant Morrison was granted permission to join with the defendant The Voice of the Orange Empire, Inc., Ltd., a corporation, in its said Motion to Dismiss the complaint and upon the grounds stated in said motion; and said motion to dismiss having been argued by counsel, was ordered submitted upon the filing of briefs.

Briefs of counsel having been filed, and the court having duly considered the complaint, motion to dismiss, briefs of counsel, and the law applicable, and on the 19th day of July, 1948, signed and ordered filed its Memorandum Opinion and order for judgment of dismissal.

It Is, Therefore, Ordered, Adjudged and Decreed that this cause be, and it is hereby, dismissed for lack of jurisdiction.

Dated: Los Angeles, California, July 30, 1948.

BEN HARRISON
U. S. District Judge

Judgment entered Jul. 30, 1948. Docketed Jul. 30, 1948. Book 52, page 349. Edmund L. Smith, Clerk; by C. A. Simmons, Deputy.

[Endorsed]: Filed Jul. 30, 1948. Edmund L. Smith, Clerk. [22]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that Plaintiff Earle C. Anthony, Inc. hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment of Dismissal for Lack of Jurisdiction, entered in this action on or about July 30, 1948, and from the whole thereof.

Dated: August 19, 1948.

OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE

By Donald H. Ford

Attorneys for Plaintiff.

[Endorsed]: Mld. copies to Otto A. Jacobs & R. M. Crookshank, Attys. for Defts. Filed Aug. 25, 1948. Edmund L. Smith, Clerk. [23]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 26, inclusive, contain full, true and correct copies of Complaint for Damages; Notice of Motion to Dismiss; Appearance on Motion to Dismiss; Memorandum Opinion; Judgment of Dismissal for Lack of Jurisdiction; Notice of Appeal and Designation of Record on Appeal which constitute the record on appeal to the Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $7.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of September, A. D. 1948.

(Seal) EDMUND L. SMITH
Clerk
By Theodore Hocke
Chief Deputy

[Endorsed]: No. 12047. United States Court of Appeals for the Ninth Circuit. Earle C. Anthony, Inc., Appellant, vs. Kenneth E. Morrison and The Voice of the Orange Empire, Inc., Ltd., Appellees. Transcript of Record. Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 25, 1948.

PAUL P. O'BRIEN
Clerk of the United States Court of Appeals for the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12047

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON, and THE VOICE OF THE ORANGE EMPIRE, INC., LTD., a corporation,

Appellees.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF THE RECORD NECESSARY FOR CONSIDERATION OF SUCH POINTS

Comes now Earle C. Anthony, Inc., Appellant herein, and states the points upon which it proposes to rely and designates the parts of the record it believes necessary for the consideration thereof.

I.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

A. That the complaint on file states a cause of action against Appellees and each of them.

B. That the causes of action stated in said complaint are within the jurisdiction of the Federal District Court.

C. That the Federal District Court had jurisdiction over the subject matter.

D. That Appellant has been deprived of equal protection of the law.

E. That Appellant has been denied its property without due process of law.

F. That Appellant has been deprived of freedom of speech and of the press.

G. That Appellant has been denied its right to engage in interstate and foreign commerce.

H. That the complaint states a cause of action for conspiracy against Appellees to deprive Appellant of its right to freedom of the press, equal protection of the laws, its property without due process of law and its right to engage in interstate and foreign commerce.

I. That a Judge of the Superior Court of the State of California is an instrumentality of the State and a judge acting in his official capacity cannot grant special privileges to one news gathering agency to the exclusion of others.

II.
DESIGNATION OF RECORD

As to all statements of points upon which Appellant intends to rely, it designates as the portions of the record necessary for consideration of such points:

The complete record, including the complaint, memorandum opinion rendered July 19th, 1948, judgment of dismissal dated July 30th, 1948 and notice of appeal.

Dated: September 22nd, 1948.

Respectfully submitted,
OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE
EUGENE OVERTON and
DONALD H. FORD
By Donald H. Ford
Attorneys for Appellant Earle C. Anthony, Inc.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 25, 1948. Paul P. O'Brien, Clerk.

No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

APPELLANT'S OPENING BRIEF.

OVERTON, LYMAN, PLUMB, PRINCE
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TOPICAL INDEX

PAGE

Jurisdiction 1

Statement of the case 2

Specifications of error upon which appellant will rely 5

Issues involved 5

Summary of argument 6

Argument 7

I.

The complaint on file states causes of action against appellees and each of them 7

1. The complaint states a cause of action for damages 7

Preliminary discussion 7

Discussion 8

A. The question of the interest involved 8

B. The occupation of gathering news is a property right which the courts will protect 20

C. The actions of Judge Morrison were done under color of law 21

D. Appellant, a corporation, has a right to sue for denial of equal protection of the law and of freedom of the press 29

E. A denial to a news gathering agency by a state official of a source of news is an act of censorship forbidden by the First Amendment 30

F. A cause of action for conspiracy was stated 31

II.

The causes of action stated in the complaint are within the jurisdiction of the federal courts 32

TABLE OF AUTHORITIES CITED

Cases	Page
Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979	22
Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835	23
Danskin v. San Diego Unified School District, 28 Cal. 2d 536	13
Grosjean v. American Press Company, Inc., 297 U. S. 233, 80 L. Ed. 660	7, 29
Hannegan v. Esquire, Inc., 327 U. S. 146, 90 L. Ed. 586	9, 14
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510	23, 24
International News Service v. Associated Press, 248 U. S. 215, 63 L. Ed. 211	7, 20, 21
Johnson v. Hoy, 47 P. 2d 252	16
Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212	16
Lopez v. Seccombe, 71 Fed. Supp. 769	16
McClure v. Board of Education, 38 Cal. App. 500	15
Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208	15
Mitchell v. United States, 313 U. S. 80, 85 L. Ed. 1201	16
People v. Tugwell, 32 Cal. App. 520	19
Picking v. Pennsylvania R. Co., 151 F. 2d 240	23, 25, 26, 27, 29
Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495	23, 24
Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 89 L. Ed. 173	16
Thomas v. Collins, 323 U. S. 516, 89 L. Ed. 430	31
United States v. Chaplin, 54 Fed. Supp. 926	25, 26
United States v. Classic, 313 U. S. 299, 85 L. Ed. 1368	23, 24
United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407, 65 L. Ed. 704	10, 14, 17, 21

PAGE

Virginia, Ex parte, 100 U. S. 313, 25 L. Ed. 667 ..... 22, 28

Westminster School District of Orange County v. Mendez, 161 F. 2d 774 ..... 16, 23

STATUTES

California Constitution, Art. I, Sec. 12 19

California Constitution (1879), Art. VI 22

Code of Civil Procedure, Sec. 177 ..... 22, 27

Education Code, Sec. 19431 13

Education Code, Sec. 19432 13

United States Code Annotated, Title 8, Sec. 41 ..... 1, 6, 32

United States Code Annotated, Title 8, Sec. 43 ..... 1, 6, 8, 21, 22, 24, 29, 32

United States Code Annotated, Title 8, Sec. 47(3) 1, 32

United States Code Annotated, Title 14, Sec. 1 32

United States Code Annotated, Title 28, Sec. 8 32

United States Code Annotated, Title 28, Sec. 12 32

United States Code, Annotated, Title 28, Sec. 13 32

United States Code Annotated, Title 28, Sec. 14 32

United States Code Annotated, Title 28, Sec. 41(1), (8), (12), (13), (14) 1

United States Code Annotated, Title 28, Sec. 225a 1

United States Constitution, Fourteenth Amendment 16, 17

No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal by Earle C. Anthony, Inc., plaintiff below, hereinafter referred to either as "appellant" or as "KFI," from a judgment of dismissal, following motions to dismiss appellant's complaint. Said judgment was entered in the District Court of the United States for the Southern District of California, Central Division.

Jurisdiction.

Appellant's complaint in paragraph I thereof [R. 2] sets forth the Constitutional and Federal questions raised by the action. Jurisdiction of the District Court is predicated on the Civil Rights Act, U. S. C. A., Title 8, Sections 41, 43 and 47(3), and on Title 28, Sections 41 (1), (8), (12), (13), and (14). This Court has appellate jurisdiction under Title 28 U. S. C. A. Section 225a.

Statement of the Case.

The complaint [R. 2-12] alleges in substance: Appellant is a California corporation, the owner and operator of radio station KFI in Los Angeles. It has invested in said station in excess of $1,500,000.00, and during the past 25 years has built up one of the largest listening audiences of any radio station in the Western States. The station has a transmission power of 50 kilowatts and its programs are heard in interstate and foreign commerce [R. 3].

Appellee, Kenneth E. Morrison, is and was a Superior Court Judge in Orange County, California [R. 3]. Appellee, The Voice of the Orange Empire, Inc., Ltd. (hereinafter referred to as KVOE), is a California corporation and the owner and operator of radio broadcasting station KVOE located at Santa Ana, in Orange County, California [R. 3-4].

KFI and KVOE are competitors. Each broadcasts news, entertainment, educational and similar type programs. The chief asset of each station is its listening audience good will. KFI has over a period of 25 years established a reputation for its prompt and accurate news reporting which has contributed to its success in attracting and maintaining a large listening audience [R. 4-5].

In 1947 Walter and Beulah Overell were killed on their yacht in Newport Beach, California, and subsequently Louise Overell, daughter of the deceased, and George R. Gollum were charged with the murder of the Overells. Their trial before Judge Morrison lasted in excess of

19 weeks and was widely publicized, both in the press and on the radio [R. 5].

Judge Morrison gave permission to KVOE to locate a microphone in his courtroom and to broadcast the trial [R. 6].

On October 4, 1947, the case had been submitted to the jury and KFI made a request of Judge Morrison for permission to broadcast the verdict from the courtroom on the same terms and conditions as he had granted to KVOE. Permission was refused, the Judge stating he was granting exclusive permission to KVOE, and justified his refusal on his authority to control his courtroom [R. 6-7].

KFI renewed its request on three separate occasions but each request was denied. When the verdict was announced, it was broadcast from the courtroom by KVOE. KFI had committed no acts that would justify the Judge in believing that if admitted to the courtroom it would create a disturbance, or interfere with the orderly conduct of the trial, and in this connection requested permission to connect its microphone into wires of KVOE outside the courtroom [R. 7-8].

On being denied the privilege of broadcasting from the courtroom, KFI requested of the Judge permission to broadcast from a location about 300 feet from the courtroom on a bridge connecting the Courthouse to an adjacent building. The Judge stated that this location was entirely without his jurisdiction and that so far as he was con-

cerned, such a broadcast could be made. Pursuant to this statement and with permission of the building custodian, KFI set up its microphone on the bridge. Approximately simultaneously with the reading of the verdict, a courthouse janitor, acting under orders of Judge Morrison, seized KFI's microphone, thereby preventing the making of a broadcast, and with the aid of two deputy sheriffs, placed KFI's engineer in restraint [R. 8-9].

In addition to KVOE, special permission was granted to "Station of the Stars, Inc.," a corporation operating radio station KMPC in Los Angeles, California, to locate its facilities in Judge Morrison's chambers and to connect its facilities to KVOE, thereby enabling KMPC to relay KVOE's broadcast [R. 9].

Damages to KFI in the sum of $150,000.00 were alleged [R. 10].

A second cause of action realleged the foregoing facts and contained appropriate allegations of conspiracy between KVOE and Judge Morrison to deprive and to deny KFI access to the courtroom and the right to broadcast [R. 10-12].

Motion to Dismiss was filed by Appellee The Voice of the Orange Empire, Inc., Ltd. [R. 13-14], and Appellee Morrison appeared on the motion and joined therein [R. 14]. After hearing, the Honorable Judge of the District Court wrote a Memorandum Opinion [R. 15-18], and a Judgment of Dismissal was entered [R. 19-20] from which this appeal is taken [R. 20].

Specifications of Error Upon Which Appellant Will Rely.

The District Court erred in entering a Judgment of Dismissal for the reasons that the facts alleged in said complaint are within the jurisdiction of the Federal District Court, the Federal District Court had jurisdiction over the subject matter and the complaint states a cause of action against appellees.

Issues Involved.

(1) Whether the complaint on file stated a cause of action against appellees and each of them.

(2) Whether the causes of action stated in plaintiff's complaint are within the jurisdiction of the Federal District Court.

(3) Whether the complaint on file stated a cause of action for conspiracy against appellee to deprive appellant of its right to freedom of the press, equal protection of the laws, its property, without due process of law, and of its right to engage in interstate and foreign commerce.

(4) Whether a judge of a state court is an instrumentality of the state and whether a judge so acting in his official capacity can grant special privileges to one news-gathering agency to the exclusion of others.

Summary of Argument.

It is the position of appellant that the right to news, that is the right to obtain news, is a property right and as such is entitled to equal protection and application of the laws. A judge of a state court when sitting in his official capacity as a judge is an officer of the state—an instrumentality thereof. While acting in his official capacity, a judge must not discriminate, and if he grants favors, privileges and rights to one person, of the same class, he is barred by the Constitution to deny the same rights, favors and privileges to others of the same class. Where one, a judge in this instance, denies to a person of a class any right, privilege or immunity, he is liable to that person, and that person has a cause of action under the Civil Rights Act (8 U. S. C. A. 41, 43).

We shall develop this argument under the following headings:

I.

THE COMPLAINT ON FILE STATES CAUSES OF ACTION AGAINST APPELLEES AND EACH OF THEM.

II.

THE CAUSES OF ACTION STATED IN THE COMPLAINT ARE WITHIN THE JURISDICTION OF THE FEDERAL COURT.

ARGUMENT.

I.

The Complaint on File States Causes of Action Against Appellees and Each of Them.

1. The Complaint States a Cause of Action for Damages.

Preliminary Discussion:

This case is believed to be one of first impression. It presents the right of freedom of speech and of the press as applied to news-gathering agencies from the aspect of freedom from restraint as to sources of news. The right to protection to news after it has been collected has been established by the Supreme Court of the United States in *International News Service v. Associated Press,* 248 U. S. 215, 63 L. Ed. 211. The right to disseminate news once collected has long since been established. (See by way of illustration *Grosjean v. American Press Company, Inc.,* 297 U. S. 233, 80 L. Ed. 660.)

This case involves protection to news-gathering agencies to their sources of news, and its importance perhaps transcends all other aspects of the problem of freedom of speech and the press, for when the sources of news are strangled, the right to ownership of news, and the right to disseminate news, are rendered of no importance, for when the source is dried up, subsequent safeguards but protect a hollow shell.

It is most unfortunate that in the present case a judge is involved. Courts are considered as the bulwarks of justice, and as that part of our government where fairness is paramount and where all persons are judged equal and treated as equals before the law. Here the acts com-

plained of were not judicial acts, but were acts of a judge in his executive or ministerial capacity, in his capacity as the moderator of his courtroom. The deprivation of rights here before the Court are similar to those that would follow if a Board of Supervisors should bar certain press services from its public hearings but permit access to others.

Discussion:

A. The Question of the Interest Involved.

The Honorable District Court in its Memorandum Opinion [R. 15-18] took the position that the matter before it did not involve a right or privilege protected by the Federal Constitution or laws, and therefore granted the Judgment of Dismissal. This approach assumes that as a prerequisite to any action for deprivation of a civil right, the right involved for which protection is sought must be one granted by a specific law or by a specific provision of the Constitution. While it is not questioned that the "rights, privileges, or immunities" made the subject of litigation must be "secured by the Constitution and laws" (8 U. S. C. A. 43), there is, we submit, a vast difference between the approach taken by the District Court and the rule to be found in the decisions of the Supreme Court with reference to the Constitutional issues at stake.

It is, of course, conceded that a judge of a trial court is not precluded from denying to all radio broadcasters the right to broadcast from his courtroom. No case has held that the right to a public trial means trial over the radio. There is no statute or law requiring a judge to open his court to radio broadcasting. If we understand the position of the District Court, it is in effect, that unless there were

such a law, appellant could have no standing in a Federal Court under the Civil Rights Act. However, it is equally true that there is no law that forbids a trial court from opening its trials to broadcasts. We thus have an area in which the Judge himself is vested with discretion; he, as Judge, as the sole legislator in this restricted area, determines whether or not broadcasting is to be permitted. In the instant case Judge Morrison decided to permit radio broadcasting. The effect of his decision is that the Judge gave a right which invoked the equal protection of the laws amendment to the Constitution. In the limited sphere of his courtroom he created a legal situation which prohibited him from unreasonable discrimination against any member of the same class to which the privilege was granted.

We believe the Supreme Court settled any doubt as to this issue by its decision in *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 90 L. Ed. 586.

Congress, by statute, divided mailable matter into four classes. Esquire magazine, as a periodical, fell into the second class. The Postmaster General sought to deny to Esquire the right to avail itself of the second-class permit on the ground that it contained obscene material. The second-class mailing privilege was found to be worth $500,000.00 a year to the magazine.

The Supreme Court pointed out that the second-class privilege was in the form of a subsidy, and said (90 L. Ed. 589, at p. 592):

> "We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied

> through the years. . . . But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States, *Ex Rel.* Milwaukee, S. D. Pub. Co. v. Burleson, 255 U. S. 407, 65 L. ed. 704. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated."

The opinion of Mr. Justice Brandeis cited with approval in the *Esquire* decision, arose in a case where the majority of the Court had ruled that the Postmaster General could deny the second-class mail privilege to a paper publishing articles that offended against the Espionage Act. (*United States Ex Rel. Milwaukee S. D. Pub. Co. v. Burleson,* 255 U. S. 407, 65 L. Ed. 704.) The same argument as that under question here was made in the *Burleson* case and Mr. Justice Brandeis disposed of it as follows (p. 715):

> "There is, also, presented in brief and argument, a much broader claim in support of the action of the Postmaster General. It is insisted that a citizen uses the mail at second-class rates not as of right, but by virtue of a privilege or permission, the granting of which rests in the discretion of the Postmaster General. Because the payment made for this governmental service is less than it costs, it is assumed that a properly qualified person has not the right to the service so long as it is offered; and may not complain if it is denied to him."

The opinion then develops the source of the right, namely, Congress, which set up the classification. It was pointed out that the Postmaster General's sole function was to determine whether the periodical in question qualified under the classification. To say that the statute gave a discretion to the Postmaster General would, according to the opinion, page 717,

> ". . . raise not only a grave question, but a 'succession of constitutional doubts,' as suggested in Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422, 53 L. ed. 253, 264, 29 Sup. Ct. Rep. 115. It would in practice seriously abridge the freedom of the press. Would it not also violate the 1st Amendment? It would in practice deprive many publishers of their property without due process of law. Would it not also violate the 5th Amendment? It would in practice subject publishers to punishment without a hearing by any court. Would it not also violate article 3 of the Constitution? It would in practice subject publishers to severe punishment for an infamous crime without trial by jury. Would it not also violate the 6th Amendment? And the punishment inflicted—denial of a civil right—is certainly unusual. Would it also violate the 8th Amendment? If the construction urged by the Postmaster General is rejected, these questions need not be answered; but it seems appropriate to indicate why the doubts raised by them are grave."

Referring to the power of the Government, it was said (p. 717):

> "The government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press,

since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression. . . ."

(P. 718):

"The right which Congress has given to all properly circumstanced persons to distribute newspapers and periodicals through the mails is a substantial right. Hoover v. McChesney, 81 Fed. 472; Payne v. United States, 20 App. D. C. 581, 192 U. S. 602, 48 L. ed. 583, 24 Sup. Ct. Rep. 849. It is of the same nature as, indeed, it is a part of, the right to carry on business which this court has been jealous to protect against what it has considered arbitrary deprivations. Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240; Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. A law by which certain publishers were unreasonably or arbitrarily denied the low rates would deprive them of liberty or property without due process of law; and it would likewise deny them equal protection of the laws."

Averting again to the contention that a privilege and not a right was involved, Justice Brandeis said (p. 718):

> "The contention that, because the rates are non-compensatory, use of the second-class mail is not a right, but a privilege, which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation."

The analogy of this case to the present case is, we submit, exceedingly close. It requires no exposition to establish that when Judge Morrison granted to KVOE the right to broadcast from his courtroom that he granted to KVOE a thing of value. This was a grant of a right to a source of news directly at its fountainhead. It is unimportant, as pointed out by Mr. Justice Brandeis, that this may have been a gratuity. If so, it was paid for by the taxpayers of the State of California. Nevertheless, it was a grant of a thing of value given to one citizen and denied to another of the same class.

Illustrative of this particular point is the case of *Danskin v. San Diego Unified School District,* 28 Cal. 2d 536.

Under Section 19431 of the Education Code of California, a School Board may authorize the use of school buildings for certain purposes. Section 19432 of the Education Code prohibited a use by organizations that advocated overthrow of the Government. Pursuant to this statute, the School Board of San Diego opened one of its High School Auditoriums to public meetings. The San Diego Civil Liberties Committee was denied the use of the building upon the refusal of their applicant to sign

an affidavit that he did not advocate and was not affiliated with any organization that did advocate overthrow of the Government by violence. Mandamus proceedings were brought to compel the School Board to grant the use of the building free of this condition.

The Supreme Court of California said (p. 545):

> "The state is under no duty to make school buildings available for public meetings. (See 86 A. L. R. 1195, 47 Am. Jur. 344.) If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings."

The Court went on to say that there was a parallel between the privilege in question and the privilege of using the mails at less than costs and it then proceeds to discuss *Hannegan v. Esquire,* and the dissent of Mr. Justice Holmes in the *Burleson* case. Again, on page 547, the Court emphasized that the state need not open its school buildings, but once it does it must not discriminate, saying:

> "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting. School desks and blackboards, like trees or street lights, are but the trappings of the forum; what imports is the meeting of minds and not the meeting place."

In considering the question of whether the Board of Education of Visalia could authorize a social dance in the high school, the Court said, in *McClure v. Board of Education,* 38 Cal. App. 500, at page 504:

> ". . . the schoolhouse, . . . , must, of course, be used for a public purpose, and that purpose must have some relation to the educational or recreational needs of the community. . . .
>
> "It is equally plain that the Board would have no authority to grant an exclusive privilege to any of the citizens to use said building."

There is nothing in the United States Constitution or in any Federal law of which we have knowledge that requires a State to provide a school of law for its citizens. Yet, when the State of Missouri provided a law school for white persons and did not make similar facilities available to colored persons, although the Missouri law did provide for payment of tuition of Negro law students in schools in adjacent States, the Supreme Court held in *Missouri Ex Rel. Gaines v. Canada,* 305 U. S. 337, 83 L. Ed. 208, Mr. Justice Hughes writing the opinion, that such a law constituted a denial of equal protection. He said in part (p. 213):

> "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it

there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination."

The above case is typical of a great many decisions in the field of equal protection of the laws. For additional cases see:

Westminster School District of Orange County v. Mendez, 161 F. 2d 774 (C. C. A., 9th)—holds that children of Mexican descent may not be denied the right to attend regular schools and cannot be segregated in separate schools.

Lopez v. Seccombe, 71 Fed. Supp. 769 (D. C. So. D. Calif.)—rules that park officials may not deny to persons of Latin blood the right to use park facilities equally with other white persons.

Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212—where a Negress was denied a right to enter a training school for librarians it was held to be a violation of the Fourteenth Amendment.

Johnson v. Hoy, 47 P. 2d 252 (Ore.)—holds that the right to fish is common to all citizens of the State and that the legislature cannot grant to one person or corporation an exclusive right to catch salmon in navigable waters of the State.

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 89 L. Ed. 173—rules that a labor union may not exclude Negroes from its membership.

Mitchell v. U. S., 313 U. S. 80, 85 L. Ed. 1201—requires a railroad to furnish substantially equal facilities to all persons.

From the foregoing authorities it is, we submit, established beyond question that the protection of the Fourteenth Amendment is not limited to those so-called rights that have been granted by some express Constitutional provision, Federal or State law, but rather protection is given to one against whom laws are not uniformly applied, regardless of the source of the law. In the language of Mr. Justice Brandeis:

> "Constitutional rights should not be frittered away by arguments . . . technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibitions are leveled at the thing, not the name.'" (*United States Ex Rel M. S. D. Pub. Co. v. Burleson,* 255 U. S. 407, 431, 65 L. Ed. 704, 717.)

The question is not whether by a particular statute a right has been given, but is of the duty of the State when it makes available to its citizens a privilege, to see that the privilege granted is upon the basis of an equality of right. A state need not open its schools as a public forum. No one has the right to force it to do so. The state need not open its schools for social dances. No statute requires it to do so. A state is not required to supply legal training to its residents, and nothing in the Federal Constitution or statutes gives a resident of a state the right to force the state to establish such a school. But once the state determines that it will permit use of schools as public forums, will permit the schools to be used for social dances, will establish law schools for its inhabitants, then it must provide such privileges on a basis of equality of rights. The test is not whether there is a right or a privilege or a permission that is granted. The Constitution deals with things, not with names, and the question is, was

equality of right taken away, and the decisions are uniform that where there is an attempt to do so the Constitution will protect.

It was suggested in the proceedings before the trial court that where a judge opened his courtroom to broadcasting that unless he retained complete discretion as to those stations that might broadcast, he would soon have his courtroom so cluttered with microphones, lines, engineers and other impediments that an intolerable situation might result. But this clearly is not the case here for the complaint alleges (and such allegations must be deemed to be true for purposes of this proceeding) that:

> "KFI had done nothing that would justify Defendant Kenneth E. Morrison to believe that if admitted to his said courtroom it would create a disturbance or do any act or acts that would interfere with the orderly conduct of the trial. In this connection KFI requested of said Defendants Kenneth E. Morrison and KVOE permission to connect its microphone into the wires connecting that of KVOE, which would have been done outside the courtroom and would have eliminated the necessity of KFI's microphone being brought into the courtroom, which permission was denied by said Defendants Kenneth E. Morrison and KVOE without right." [R. 8.]

It is our position that a judge who opens his courtroom to broadcasting may impose such restrictions on the exercise of the right thus conferred as will reasonably be calculated to insure proper courtroom decorum, but in doing so there must be no discrimination among those desiring to avail themselves of that right. For example, a judge might condition his approval to a pooling plan such as that requested by KFI, as above set forth.

Actually the control of broadcasting privileges presents no more practical problems than the control of the public attendance at a trial. Most trials, by law, must be public. The public has a right, therefore, to be present. This right does not mean that 1,000 spectators can crowd into a courtroom that will seat but 100. The judge has the power to control his courtroom and has the right to limit attendance, so long as he does so on a non-discriminatory basis. This is well illustrated by the case of *People v. Tugwell,* 32 Cal. App. 520. Article I, Section 12, of the Constitution of California, requires that criminal trials must be public. In a murder trial, there was a disturbance in the galleries, which the judge ordered the bailiff to suppress. This the bailiff did by clearing the galleries and locking the gallery doors, which doors were kept locked for about 30 minutes. The Court was accessible during this period through the witness door and about 15 spectators remained on the floor of the courtroom. The locking of the door was assigned as a denial of a public trial. The Appellate Court held:

> "There was no discrimination as to the presence of those so permitted to remain. Under these circumstances. we are of the opinion that the trial as conducted did not lose its character in the sense that it was public, as distinguished from a secret or star-chamber trial."

Note the importance placed by the Court on the question of discriminatory selection and the holding that so long as admission to the courtroom was on a non-discriminatory basis the trial would not be affected. Thus, we believe, any

reasonable rule or regulation that is non-discriminatory with reference to broadcasting is the protection to a judge who opens his courtroom to broadcasting. Certainly, he retains all his prerogatives and authority as a judge with full control of his courtroom; he is but charged with the obligation to treat all broadcasters on an equality of right.

B. The Occupation of Gathering News Is a Property Right Which the Courts Will Protect.

The Supreme Court in *International News Service v. Associated Press,* 248 U. S. 215, 63 L. Ed. 211, in an action brought to determine whether news as such had a property value that could be protected from pirating by another news-gathering agency, held:

> "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (*Re* Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482; *Re* Debs, 158 U. S. 564, 593, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired (Truax v. Raich, 239 U. S. 33, 37, 38, 60 L. ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Brennan v. United Hatters, 73 N. J. L. 729, 742, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition."

In the present case, appellant is seeking protection from this Court of its right to acquire news, which right the Supreme Court has ruled is as much entitled to protection as the right to guard property already acquired.

Clearly, if a judge acting in his official capacity can grant special favors to one news-gathering agency and can, with impunity deny that same right to other members of the same class, the protection adjudged by the Supreme Court in the *Associated Press* case is not being given.

In *United States Ex Rel. M. S. D. Pub. Co. v. Burleson,* 255 U. S. 407, 432, 65 L. Ed. 704, 718, Mr. Justice Brandeis, citing a long list of cases, said:

> "The right which Congress has given to . . . distribute newspapers and periodicals through the mails is a substantial right. . . . It is of the same nature as, indeed, it is a part of, the right to carry on business which this Court has been jealous to protect against what it has considered arbitrary deprivations."

C. The Actions of Judge Morrison Were Done Under Color of Law.

The acts here complained of were acts of a judge done by him in connection with his official duties as a judge. It is appellant's position that all of such acts were done under color of law, within the meaning of 8 U. S. C. A. 43.

Equal protection of the law applies to judicial action.

> "It is, doubtless, true, that a State may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions

of the Amendment extend to all action of the State denying equal protection of the laws, . . ."

Ex Parte Virginia, 100 U. S. 313, 25 L. Ed. 667, 669.

See, also:

Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979.

The Constitution of the State of California provides that there shall be a Judicial Department (Article VI, Constitution of 1879). The mere existence of a judiciary carries with it the necessary ancillary authority to supervise the conduct of judicial proceedings and to maintain order and discipline in the courtroom. Section 177 of the California Code of Civil Procedure provides:

"Every Judicial officer shall have power:

"(1) To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty."

The acts of Judge Morrison in the present case were possible only because of his official position as an officer of the State of California and it was only by virtue of the office that he held that he was able to grant to KVOE the right that he denied to KFI. Thus, simply because he was a judge, and only because he was a judge, was Judge Morrison able to deny to KFI the right to broadcast.

Under 8 U. S. C. A. 43:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the juris-

diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

There have been a great many cases construing the above section, particularly with reference to the phrase "color of law" and the rule as to the meaning of that phrase has become quite well settled.

See:

Picking v. Pennsylvania R. Co., 151 F. 2d 240 (C. C. A., 3rd);

Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835;

Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495;

United States v. Classic, 313 U. S. 299, 85 L. Ed. 1368;

Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510;

Westminster School Dist. of Orange County v. Mendez, 161 F. 2d 774 (C. C. A., 9th).

Perhaps no better summation of the rule is found than that given by this Court in the *Westminster School District* case just cited. In that case suit was brought by fathers of school children of Mexican descent on the grounds that their children had been denied equal protection of the laws of California in that the school board prevented them from attending the ordinary and regular schools and required that Mexican children be segregated in separate schools. The issue in the case was not whether the facilities available for Mexican children were equiva-

lent to those available for white children, but whether the requirement that they use separate facilities did not discriminate and give rise to a cause of action under the Civil Rights Act (8 U. S. C. A. Sec. 43). This Court not only held this segregation to be violative of the equal protection of the law amendment but held the acts of the school board to have been under color of state law even after finding that the acts of the board could not be justified by any state legislation and was in fact *contra* to the legislation of the state. This Court in arriving at this conclusion reviewed the three leading Supreme Court cases on the question of color of law, namely, *Home Telephone & Telegraph Co. v. Los Angeles, Screws v. United States,* and *United States v. Classic* (cited *supra*), and quoted excerpts from these cases. From the *Screws* case:

> "Acts of officers who undertake to perform their official duties are included [by the phrase 'under color of law'] whether they hew to the line of their authority or overstep it."

From the *Classic* case:

> "Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with authority of State law, is action taken 'under color of' State law."

From the *Home Telephone* case:

> ". . . the subject must be tested by assuming that the officer possessed the power if the act be one which there would not be opportunity to perform but for the possession of some State authority."

Applying the law, then, to the facts as alleged in the present case, it is clear that the acts of Judge Morrison

were possible only because of his official position as an officer of the State of California and it was only by virtue of the authority of his office that he was able to grant a right to KVOE that he denied to KFI.

It was strenuously contended for by counsel for appellees before the District Court that the fact that the State official here involved was a judge resulted in a different rule because of certain common law concepts of the immunities of a judge which bars any suit against a judge for any erroneous decisions that he might have made and that a suit such as the nature of the action here filed cannot be maintained where a judge is a defendant.

At the outset, it should be observed that such an argument carried to its logical conclusion requires its exponents to take the position that a judge, simply because of and by virtue of his office, is above the law and the Constitution, and that because a man is a judge he possesses a special privilege not possessed by other officials. This would be a special privilege that would permit him to deny equal protection of the law, to discriminate arbitrarily in favor of one of a class against others of the same class and to abrogate the Constitutional guarantee of freedom of speech and press. Thus, they must ultimately argue that if the person charged with any of the above violations happens to be a judge engaged in his official duties he is immune. We do not and cannot conceive this to be the law.

We have found but two cases that consider this point from the aspect of violation of the Civil Rights Act:

Picking v. Pennsylvania R. Co., 151 F. 2d 240 (C. C. A., 3rd);

United States v. Chaplin, 54 Fed. Supp. 926 (Dist. Ct. So. Dist. of Calif.).

The *Chaplin* case was a claim of conspiracy to deprive plaintiff of her civil rights. One of the conspirators named was a City Court Judge in Beverly Hills. This case held that where the acts of the judge involved the sentencing of a person after arraignment and plea of guilty, that the common law immunities protected him against suit under the Civil Rights Act.

The *Picking* case holds directly to the contrary. In that case one of the defendants was a Justice of the Peace who was alleged to have denied and refused a hearing to the plaintiff. The Court in holding that a cause of action had been stated against the Justice said:

> "In making this statement we are not unmindful of the absolute privilege conferred by the common law upon judicial officers in the performance of their duties. Pertinent authorities relating to the common law privileges are collected and discussed in United States v. Chaplin, D. C. S. D. Cal. C. D., 54 F. Supp. 926, and in Allen v. Biggs, D. C. E. D. Pa., 62 F. Supp. 229. See also Jennings, Tort Liability of Administrative Officers, Selected Essays on Constitutional Law, Vol. 4, pp. 1271-1274. The absolute privilege was extended even to the conduct of judicial officers dictated by malice. But the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person.' R. S. Section 1979 applies to 'every person.' We can imagine no broader definition. The Statute must be deemed to include members of the state judiciary

acting in official capacity. The result is of fateful portent to the judiciary of the several states. See the statements of Chancellor Kent in Yates v. Lansing, 1810, 5 John, N. Y., 282, 291, 298. But the policy involved is for Congress and not for the courts. Assuming, as we think we must, that the provisions of Section 1 of the Civil Rights Act must be considered with the qualification set out in the last paragraph of footnote 12, *infra,* as in *pari materia* with Section 20 of the Criminal Code under consideration in the Screws case, the conclusion which we have expressed is foreshadowed by that decision, by the Classic case, *supra,* and by the decisions of the Supreme Court in the cases of *Ex Parte* Virginia and Virginia v. Rives, *supra.* For the reasons stated we conclude that the court below erred in dismissing the complaint as to Justice of the Peace Keiffer."

Certiorari was denied by the Supreme Court in the *Picking* case in 92 L. Ed. (Adv. S.) 82.

While the *Picking* case, with the refusal of the Supreme Court to grant certiorari, would seem to settle the rule, we again point out that the acts of Judge Morrison here under review were not judicial acts, that is decisions or rulings made in the process of litigation, but were ministerial or executive acts. Under Section 177 of the California Code of Civil Procedure, a judge is empowered to keep order in his courtroom. His bailiff, of course, has a similar duty. Obviously when the act is ministerial, the common law immunity could not exist.

Ex Parte Virginia, 100 U. S. 339, 25 L. Ed. 676, a civil rights case, held that a judge in selecting a jury was performing a ministerial act and that the question of the common law privilege of immunity for judicial acts of a judge was not before the Court. The Court said:

> "We do not perceive how holding an office under a State and claiming to act for the State can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.
>
> "It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State Judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc."

It is difficult to believe that the determination of the spectators to a trial can be more judicial in nature than

the selection of the jury to hear the trial, and if selection of jurors is not judicial action there can be no question but that the selection of the spectators is not a judicial act.

Consequently, we submit that there can be no question based on the facts of the present case that the common law rule of immunity to judges for judicial acts is not applicable. Even if we had a judicial act, the rule of the *Picking* case makes such a defense unavailable where suit is brought under the Civil Rights Act.

D. Appellant, a Corporation, Has a Right to Sue for Denial of Equal Protection of the Law and of Freedom of the Press.

Grosjean v. American Press Co., 297 U. S. 233, 80 L. Ed. 660.

In the *Grosjean* case nine newspaper publishers brought suit to enjoin enforcement of an act of the legislature of Louisiana establishing a license tax on newspapers with a publication in excess of twenty thousand. This tax was assailed as being in conflict with the First and Fourteenth Amendments. Suit was filed under 8 U. S. C. A. 43. The Court held:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment. . . .
>
> "That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgment by State legislation, has likewise been settled by a series of decisions of this Court. . . .

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, as we have held, is not a 'citizen' within the privileges and immunities clauses. . . . But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses which are the clauses involved here."

The Court then held that a cause of action had been stated and that the tax was unlawful.

The gravamen of the case here on appeal is freedom of the press and a denial of equal protection of the law, which brings appellant's case squarely within the jurisdiction of the Federal Courts.

E. A Denial to a News Gathering Agency by a State Official of a Source of News Is an Act of Censorship Forbidden by the First Amendment.

No extensive citations of authorities would seem necessary to establish the self evident fact that if a news agency is denied access to news, there is a most effective censorship of news. Indeed a free source of news is essential to an enlightened people and when sources of news are effectively dammed, there can be no true freedom of the press. The world has just witnessed the tight lid of censorship clamped upon news as applied by the Russian Government in the series of conferences held in Moscow with reference to lifting the Berlin blockade. The World Press was reduced to reporting the progress of the meetings by descriptions of whether the diplomats in attendance looked haggard, cheerful or concerned. This was censorship of news at its source—the most effective of all types of censorship.

If any governmental agency exercises a power of veto over who shall have the right to report the news from such agency, there is a step towards censorship. For example: Suppose a Board of Supervisors is conducting a series of public hearings. Press A has been critical of the conduct of the Board. Press B has been laudatory. If the Supervisors issued an order barring representatives from Press A and giving an exclusive to Press B, is it likely that anything but callow praise will be reported by Press B as to future hearings? This does not lead to free dissemination of ideas and does not develop an informed people, which, we believe, is the basic purpose of the First Amendment. It may be contended that the act of the Judge in the present case in excluding one news agency to favor another was but a little inconsequential thing. But it is from the little tyrannies that larger ones take root and grow and in growing break down the foundations of liberty. (*Thomas v. Collins,* 323 U. S. 516, 89 L. Ed. 430.)

F. A Cause of Action for Conspiracy Was Stated.

This is an issue we will not belabor. If the first cause of action is found by this Court to be good, then it would follow that a cause of action for conspiracy would likewise be capable of being stated. If, and this is not conceded, there are any technical defects in the conspiracy pleading, the action of the trial court should have been to have allowed an amendment and not a dismissal. For to dismiss for a technicality of pleading is an abuse of discretion.

II.

The Causes of Action Stated in the Complaint Are Within the Jurisdiction of the Federal Courts.

Much of the discussion under the preceding topic dealing with the proposition that a cause of action was stated is applicable to the topic here under consideration.

Section 41 of Title 8, U. S. C. A., secures to all equal rights under the law.

Section 43 of Title 8, U. S. C. A., gives a cause of action at law to every person who, under color of any statute, ordinance, regulation, custom or usage of any state subjects or causes to subject another to the deprivation of any rights, privileges or immunities secured by the Constitution and laws.

Section 47 of Title 8, U. S. C. A., gives a cause of action where there is a conspiracy for the purpose of depriving, either directly or indirectly, any person of the equal privileges under the law.

Under Topic I we have discussed the nature of the right involved, establishing, we believe, that a right within the purview of the above referred to section was here violated and equality protection of the laws were denied.

That a District Court has jurisdiction to hear such a case is specifically provided by Sections 1, 8, 12, 13 and 14 of Title 28, U. S. C. A.

It Is Therefore respectfully submitted that a good cause of action was stated, and that this cause of action was within the jurisdiction of the Federal Court.

Surely a Court should be the last place where a state should deny equality of the law and if any branch of the state should be held to a high standard of fairness and impartiality it should be its judicial system.

Respectfully submitted,

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No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

REPLY BRIEF OF KENNETH E. MORRISON AND THE VOICE OF THE ORANGE EMPIRE, INC., LTD.

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TOPICAL INDEX

PAGE

Statement of the case 1

Argument 3

I.

The complaint fails to state a cause of action 3

A. KFI had no civil right to broadcast from the courtroom 3

B. KFI had no right to the use of Judge Morrison's chambers or the KVOE private wire 8

II.

It appears from the complaint that there is no federal question involved 12

III.

Judges are exempt from civil suit 14

IV.

Authorities cited by plaintiff are not in point 17

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases.	PAGE
Anderson v. Dunn, 6 Wheat. 204, 19 U. S. 204, 5 L. Ed. 242	8
Bunn v. City of Atlanta, 19 S. E. 2d 533	4
Danskin v. San Diego School District, 28 Cal. 2d 536	17
Denmon v. City of Pasadena, 101 Cal. App. 769, 282 Pac. 820	8
Emmons v. Smitt, 149 F. 2d 869	4
Hannegan v. Esquire, 327 U. S. 146	17
Hull v. Bury, 234 U. S. 712, 34 S. Ct. 892, 58 L. Ed. 1557	12
International News v. Associated Press, 248 U. S. 215, 63 L. Ed. 211	18
Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212	18
Lamar Pub. Co. v. Hoag, 131 Pac. 400	5
Lopez v. Seccombe, 71 Fed. Supp. 769	18
Love v. Chandler, 124 F. 2d 785	13
Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208	18
Mitchell v. Greenough, 100 F. 2d 184	3, 4
Osaka Shosen Kaisha Line v. United States, 300 U. S. 98, 81 L. Ed. 532	16
People v. Tugwell, 32 Cal. App. 520	4
Picking v. Pennsylvania Railroad, 151 F. 2d 240	14, 15
Rishel v. Pacific Mutual Life Ins. Co., 78 F. 2d 881	8
Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495	17
Snowden v. Hughes, 321 U. S. 1	13
South v. French, 40 Cal. App. 28, 180 Pac. 357	8
Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 89 L. Ed. 173	18
Storm Waterproofing Corporation v. L. Sonneban Sons, 28 F. 2d 115	12
United States v. Chaplin, 54 Fed. Supp. 934	8, 14, 16

PAGE

United States v. Classic, 313 U. S. 299, 85 L. Ed. 1368 17

United States v. Mozley, 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355 13

Virginia, Ex parte, 100 U. S. 339, 25 L. Ed. 667 18

Westminster School District of Orange County v. Mendez, 161 F. 2d 774 18

Statutes

California Constitution, Art. I, Sec. 12 5

Code of Civil Procedure, Sec. 177 3

Education Code, Sec. 19431 17

Statutes of Colorado, Sec. 2159 5

United States Code Annotated, Title 8, Secs. 43, 47 4

Textbooks

14 American Jurisprudence, p. 293 16

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REPLY BRIEF OF KENNETH E. MORRISON AND THE VOICE OF THE ORANGE EMPIRE, INC., LTD.

Statement of the Case.

Appellant is appealing from a judgment of dismissal granting a motion to dismiss appellant's complaint.

Appellant's statement of the contents of the complaint is accurate and fair. Appellees believe that the controlling portions of the complaint, upon which they rely for an affirmance of the judgment, should, for reasons of clarity and the convenience of this court, be restated here. The appellant, Earle C. Anthony, Inc., will hereinafter be referred to either as "appellant" or as "KFI," and appellee, The Voice of the Orange Empire, Inc., Ltd., as "KVOE."

The material portions of the complaint allege in substance: KFI and KVOE are both radio stations broadcasting news, entertainment and similar types of programs to the general public, and are in competition with each other. [R. 4-5.]

In the year 1947, Walter Overell and Beulah Overell, his wife, met death while on their palatial yacht in Newport Harbor, Orange County, California. Subsequently Louise Overell, daughter of the couple, and her fiance, George R. Gollum, were charged with their murder in the Superior Court of the State of California, in and for the County of Orange. The trial, at which appellee Judge Morrison presided, was one of the most sensational ever to take place, and during its more than nineteen weeks of progress was widely publicized by the press and radio. [R. 5.]

Through permission of Judge Morrison, KVOE installed a private wire and placed equipment both in the courtroom and in the Judge's private chambers, making daily broadcasts of portions of the trial. [R. 6, 9.]

On October 4, 1947, the case was submitted to the jury, and KFI asked Judge Morrison's permission to broadcast the verdict on the same terms and conditions as KVOE. Permission was refused, the Judge stating he was granting exclusive permission to KVOE, and justified his refusal on his authority to control his court. [R. 6-7.]

KFI had committed no acts that would justify the Judge in believing that if admitted to the courtroom it would create a disturbance or interfere with the orderly conduct of the trial *and in this connection, requested permission to connect its microphone into KVOE's private wire outside of the courtroom, which permission was refused.* [R. 7-8; App. Op. Br. p. 3.]

Judge Morrison gave radio station KMPC permission to locate its equipment in his chambers which adjoined the courtroom, and to connect with the KVOE leased wire, enabling KMPC to relay the KVOE broadcasts to its listening audience. [R. 9.]

ARGUMENT.

I.

The Complaint Fails to State a Cause of Action.

A. KFI Had No Civil Right to Broadcast From the Courtroom.

It is the contention of appellees that there is no civil right to broadcast from a courtroom, but it is rather a privilege that may be extended or refused by the Judge. Further, that only rights or privileges protected by the Federal Constitution can be made a basis of an action under the Civil Rights Statutes. We are not here concerned with the question of whether or not the right to collect news is a property right, but whether or not there is a civil right which is protected by the Constitution of the United States to enter a courtroom with broadcasting equipment.

Section 177 of the California Code of Civil Procedure provides in part that a judicial officer has power "1. To preserve and enforce order in his immediate presence. . . ."

The distinction between a privilege and a right is recognized in the case of *Mitchell v. Greenough,* 100 F. 2d 184. In this case plaintiff, a lawyer, was convicted in the State Courts of Washington of a crime. He was paroled on condition that he acquiesce in an order of disbarment in the State Courts of Washington. Thereafter an order of disbarment followed in the United States District Court for the Eastern District of Washington. Plaintiff alleges that the prosecuting attorney, the witnesses and the Superior Court Judge before whom he was tried conspired to have him disbarred by convicting him on testimony they knew to be perjured. As in the case here at issue,

relief was sought in the United States Courts under the provisions of Federal Statutes, 8 U. S. C. A., Sections 43, 47. A quotation from *Mitchell v. Greenough* will illustrate the point we here desire to make:

> "We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws. Bradwell v. State of Illinois, 16 Wall. 130, 21 L. Ed. 422; *Ex parte* Lockwood, 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929. In Green v. Elbert, 8 Cir., 63 Fed. 308, the Circuit Court of Appeals held that the conspiracy to deprive a lawyer of his right to practice law in the state courts was not a conspiracy to interfere with any right or privilege granted, secured or protected by the Constitution of the United States."

To the same effect is *Emmons v. Smitt,* 149 F. 2d 869 (certiorari denied).

The case of *Bunn v. City of Atlanta,* 19 S. E. 2d 533, contains the following statement:

> "The due process and equal protection clauses of the Federal and State Constitutions protect rights alone, and have no reference to mere concessions or mere privileges which may be bestowed or withheld by the State or Municipality at will. Discriminating in the granting of favors is not a denial of the equal protection of the law to those not favored."

The point made in *Bunn v. City of Atlanta* has been recognized by both the State Courts of California and the United States Courts. In *People v. Tugwell,* 32 Cal. App. 520, we find a case where the defendant was convicted of manslaughter and appealed on the ground, among

others, that he was denied a public trial. Article I, Section 12, of the California Constitution requires criminal trials to be public. A disturbance occurred and the Judge ordered the courtroom cleared, although some fifteen spectators remained. In affirming the judgment of conviction, the court held that if a reasonable proportion of the public is suffered to attend, the trial would not lose its character in the sense that it was public as distinguished from a secret or star-chamber trial. The point of the *Tugwell* case, applicable here, is that the right to enter a courtroom was not predicated upon the proposition that it is for the welfare of he who seeks to enter, but instead for the public welfare and protection of the accused.

The case of *Lamar Pub. Co. v. Hoag,* 131 Pac. 400, illustrates the principle. Here Charles Hoag was County Clerk of Powers County, Colorado. Section 2159, Statutes of Colorado, required him to publish a list of all nominations to public office by a certain date. The only newspaper in the county was owned by the Lamar Pub. Co. Hoag refused to publish and the newspaper sued. In denying relief, the Supreme Court of Colorado said:

> "The statute requiring the clerk to publish the list of nominations was clearly intended for the benefit of the public, and not for the benefit of newspapers. The benefit to the latter was only incidental. Certainly the law was not passed with the idea of benefiting publishers. So that the duty imposed was purely a public one. When the duty imposed upon an officer is one to the public only, its nonperformance must be a public and not an individual injury, and must be redressed in a public prosecution of some kind, if at all. 2 Cooley on Torts (3d Ed.) 756. Numerous instances are given by the author. For instance, the duty of a policeman is to watch the

premises of individuals and protect them against burglary and arson. If he goes to sleep in front of a house and a burglar enters it or it burns down, which would have been prevented had the policeman been awake, the owner cannot recover from the policeman; for the latter owed the former no legal duty. His duty was to the public. The author says further on: 'An individual can never be suffered to sue for any injury which technically is one to the public only; he must show a wrong which he specially suffers, and damage alone does not constitute wrong.'

"In Miller v. Ouray E. L. & P. Co., 18 Colo. App. 131, 70 Pac. 447, the minor son of the plaintiff, while confined in a jail, charged with a criminal offense, was suffocated by a fire which took place in the jail. The fire was charged to have been caused by defective electric wiring of the building. The county commissioners were made defendants with the electric light company. The plaintiff sought to hold the commissioners liable, because the statute required them to make personal examination of the jail, of its sufficiency and management, and to correct all irregularities and improprieties found therein, which it was charged they failed to do. It was held that the duty imposed by the statute was a public one, and its breach was held not to constitute a private wrong for which the injured party could recover in an individual action. Colo. P. Co. v. Murphy, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630, was a case in which Murphy, in his complaint, alleged that he was the lowest reliable and responsible bidder on a paving contract in the city of Denver, notwithstanding which the board of public works awarded the contract to the paving company, in violation of a provision of

the city charter that the contract should be awarded to the lowest reliable and responsible bidder. The court held that it was obvious that the provision of the charter was not enacted for the benefit of bidders, and that Murphy had no right of action. The court quoted from Strong v. Campbell, 11 Barb. (N. Y.) 125-138, wherein it was said: 'Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action.'

"In Talbot P. Co. v. Detroit, 109 Mich. 657, 67 N. W. 979, 63 Am. St. Rep. 604, the substance of the opinion is stated in the syllabus thus: 'Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city to recover the profits which might have been made had his bid been accepted.' It was so held because the charter provision was not passed for the benefit of the bidder, but as a protection to the public.

"So in the present case the statute was not passed in order that newspapers might make money by the publication of the list of nominations, but in order that the voters should be advised of the candidates whose names would appear upon the ticket at the election. The ruling of the district court, therefore, in sustaining the demurrer to the complaint was right, and the judgment is affirmed.

"Judgment affirmed."

As has heretofore been stated, it is the duty of a Judge to maintain order in his courtroom and limit those who may enter to a number commensurate with an orderly proceeding of the trial. With literally thousands wishing to be present when the verdict was rendered in one of the most sensational murder trials in history, the Judge must necessarily arbitrarily limit the number that may enter the courtroom of a rural County Court. Keeping this fundamental principle in mind, Judge J. F. T. O'Connor's quotation from the case of *Anderson v. Dunn,* 6 Wheat. 204, 19 U. S. 204, 5 L. Ed. 242, is apropos:

> "But there is one maxim that necessarily rides over all others, in the practical application of government; it is, that the public functionaries must be left at liberty to exercise the powers that people have entrusted to them. . . . Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers."
>
> *United States v. Chaplin,* 54 Fed. Supp. at 934.

B. KFI Had No Right to the Use of Judge Morrison's Chambers or the KVOE Private Wire.

It is fundamental that a cause of action may be pleaded both generally and specifically. (*South v. French,* 40 Cal. App. 28, 180 Pac. 357.) It is equally well established that a complaint which alleges both generally and specifically is insufficient if the specific acts alleged preclude the cause of action.

Rishel v. Pacific Mutual Life Ins. Co., 78 F. 2d 881 (C. C. A. 10th);

South v. French, supra;

Denmon v. City of Pasadena, 101 Cal. App. 769, 282 Pac. 820.

It is also an admitted principle of law conceded by appellant that a Judge not only has the power, but the duty, to limit those entering the courtroom to the number commensurate with the orderly proceeding of the trial; that, to quote appellant, the right to enter a courtroom "does not mean that 1,000 spectators can crowd into a courtroom that will seat 100. The Judge has the power to control his courtroom and has the right to limit attendance, so long as he does so on a non-discriminatory basis." (App. Op. Br. p. 19.)

Applying the above principles to the pleadings, it is apparent that the complaint filed by KFI fails to state a cause of action. KFI makes the general allegation:

> "KFI had done nothing that would justify defendant Kenneth E. Morrison to believe that if admitted to his said courtroom it would create a disturbance or do any act or acts that would interfere with the orderly conduct of the trial." [R. 8.]

The next sentence is specific; it alleges:

> *"In this connection KFI requested of said defendants, Kenneth E. Morrison and KVOE, permission to connect its microphone into the wires connecting that of KVOE which would have been done outside the courtroom, which permission was denied by defendants Kenneth E. Morrison and KVOE without right."* [R. 8.]

Later in the complaint, KFI complains that Judge Morrison "granted special and exclusive permission" to

KMPC, another radio station, "to locate its broadcasting facilities in the chambers of defendant Kenneth E. Morrison adjoining the courtroom, and to connect said facilities with those of defendant KVOE which had been set up in the courtroom." [R. 9.] In appellant's brief it states:

> "It is our position that a Judge who opens his courtroom to broadcasting may impose such restrictions on the exercise of the right thus conferred as will reasonably be calculated to insure proper courtroom decorum, but in doing so there must be no discrimination among those desiring to avail themselves of that right. For example, a Judge might condition his approval to a pooling plan such as that requested by KFI, as above set forth." (App. Op. Br. p. 18.)

The allegation by KFI that it would create no disturbance in the courtroom because it could hook onto the KVOE private wire outside the courtroom or could use the Judge's private chambers brings us just about to the meat of the situation. It is to be remembered that the Overell murder trial lasted in excess of nineteen weeks. KVOE installed its equipment at the beginning and made daily broadcasts during the entire trial. Appellant's own complaint states that it did not seek space in the courtroom until the time of the verdict, a time when more people would be expected to seek admittance to the courtroom than any other time. KFI fails to point out what possible legal right it could have to tap into the leased wire maintained by KVOE at KVOE's expense for more than nineteen weeks. KFI fails to point out what pos-

sible legal right it would have to enter Judge Morrison's private chambers. Surely it is not contended that KVOE did not have a perfect right to make arrangements with KMPC to use its facilities and not to so contract with KFI. Surely it is not contended that Judge Morrison did not have the right to invite one into his private chambers and not another. Surely if there is any property right involved in this case, it is the property right of KVOE in its own private leased wire. KFI urges this court to rule that Judge Morrison was under an obligation imposed by the Constitution of the United States to require KVOE to permit KFI to tap its wire, to use its microphone, and to use its facilities at a time designated by KFI, some nineteen weeks after installation. If there is any property right involved, it is the property right of KVOE to exclusively use its own private wire to broadcast the verdict. For nineteen long weeks KVOE had alone borne the cost of the installation and certainly had a right to exclusively use its wire at the time of the climax of public interest, and was not required to share this with an admitted competitor. If a man has worked long and hard husbanding the fruits of his labors, must he share what he has saved with another who sat idly by? It is our position that had Judge Morrison sincerely wished KFI to have the privilege of connecting outside the courtroom with the KVOE wire, he would have had no right to so order. Judge Morrison is here sued for not doing something he had no right to do.

II.

It Appears From the Complaint That There Is No Federal Question Involved.

Stripped of its surplusage, the complaint merely alleges that the defendant Kenneth E. Morrison, Judge of the Superior Court, maliciously refused to permit plaintiff to place its microphone in the court room over which he presided, and conspired with defendant The Voice of the Orange Empire, Inc., Ltd., to refuse plaintiff permission to tap The Voice of the Orange Empire, Inc., Ltd.'s private wire—and no more.

For a plaintiff to successfully invoke the jurisdiction of the United States Courts on the ground that protection of a Federal right is sought, the complaint, on its face, must appear to raise a substantial Federal question.

In *Storm Waterproofing Corporation v. L. Sonneban Sons,* 28 F. 2d 115, p. 117, the court states: "Jurisdiction must be made to appear from the pleaded facts."

In *Hull v. Bury,* 234 U. S. 712, p. 720, 34 S. C. 892, 895, 58 L. Ed. 1557, 1562, the court states:

> "The motion must be granted unless the suit was one arising under the laws of the United States, within the meaning of the first subdivision of Sec. 24 of the Code. The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result de-

pends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal Law."

There is no case precisely in point, but it is fundamental that it was not intended by the Civil Rights Statutes to make a Federal question of every departure by State officials from State laws.

Love v. Chandler, 124 F. 2d 785;

U. S. v. Mozley, 238 U. S. 383, 35 S. C. 904, 59 L. Ed. 1355.

In *Snowden v. Hughes,* 321 U. S. 1, Mr. Justice Frankfurter well points out this principle by stating:

"Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court."

The principle is equally well stated by Judge Harrison in his opinion which is before this court, when he states:

"If the practice of law is not a privilege granted by the Federal Court or laws, how can it be construed that the right to broadcast from a courtroom is a privilege granted under the supreme law of the land?"

III.
Judges Are Exempt From Civil Suit.

Since the beginning of the common law it has been fundamental that Judges are exempt from civil suit. The only case that suggests the contrary is *Picking v. Penn. Railroad,* 151 F. 2d 240 (C. C. A., 3rd). This case contains dicta to the effect that the Civil Rights Act abrogates the exemption of Judges from civil suits. We maintain that the statement contained in the case is not a correct interpretation of what Congress intended, is pure dicta, and will not be followed. Even if it is a correct interpretation of the intention of Congres, it is in violation of the Constitution of the United States. The history of the common law rule that Judges are exempt from civil suit is admirably set forth in the opinion of Judge O'Connor, reported in *United States v. Chaplin,* 54 Fed. Supp. 929 (1944). Portions of the opinion follow:

> "Liability to answer to everyone who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility."
>
> "The immunity which has clothed judges for a century and a half in our Country found its genesis in the English common law simultaneously with the independence of the judiciary. The disappointed litigant cannot embarrass the judge in a civil action for damages irrespective of the justice of his decision, nor can a defendant upon whom sentence has been pronounced, recover damages against the judge for the real or supposed wrong."

"To sustain the Government's contention would be to destroy the independence of the judiciary and mark the beginning of the end of an independent and fearless judiciary."

An examination of the facts stated in the *Picking* case clearly shows that the statement abrogating the exemption of Judges was in no way necessary to the decision. We quote from the court's statement of facts:

"The complaint also asserts that the original arrest or seizure of the plaintiffs was without warrant of any kind; that the governor's warrant hereinbefore referred to was issued after the plaintiffs' arrest and imprisonment at Chambersburg; that the plaintiffs were taken unlawfully to Harrisburg by certain of the defendants; that plaintiff Mrs. Picking was robbed of $10.00 by the defendant Graham. . . ."

"In several paragraphs of the complaint it is alleged that the unlawful acts were instituted and encouraged by all of the defendants with the exception of Governor James, Mr. Dewey and the Pennsylvania Railroad Company, but that these defendants 'adopted' all the unlawful acts complained of as their own. . . ."

Clearly judicial exemption from suit is not extended to a Judge who is alleged to have participated in robbery and assault.

It has always been the law that dicta is to be disregarded and avoided; that an Appellate Court does not approve the dicta in a lower court's decision by refusing to grant a hearing.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be connected with the case in which those expressions are used. If they

go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, where the very point is presented."

Osaka Shosen Kaisha Line v. United States, 300 U. S. 98, 81 L. Ed. 532 (1937).

". . . to make an opinion a decision there must have been an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties."

14 Am. Jur. 293.

Counsel for plaintiff in apparent recognition of the weakness of his "authority" attempts to side-step it by lengthy argument that the acts of Judge Morrison were ministerial and not judicial. This we believe immaterial. All acts necessary to the trial of a case are exempt from civil suit whether by Judge, jury or attorneys.

"The house should not be burned to destroy the mouse. To sustain the Government's contention would invite siimlar actions against grand and petit jurors, prosecuting attorneys and attorneys representing clients before our courts and juries, now immune."

United States v. Chaplin, 54 Fed. Supp. 929, at p. 934.

If the exemption of Judges from civil suit is essential to a free and independent judiciary, as all eminent authority since the beginning of the common law has maintained, then to destroy it would be to destroy by Act of Congress one of the basic principles of the United States Constitution. The foundation of the Constitution is the premise that the three branches of government are free and independent of each other.

IV.

Authorities Cited by Plaintiff Are Not in Point.

The case of *Hannegan v. Esquire* (1945), 327 U. S. 146, is of no help. Congress enacted a statute giving second class mail privileges to certain types of publications. Congress also has enacted a statute making obscene matter non-mailable. Congress has never given the Postmaster General power of censorship. The case merely holds that the Postmaster General was attempting to exercise the power of censorship—a power he does not have.

The case of *Danskin v. San Diego School District* (1946), 28 Cal. 2d 536, is not in point. Section 19431 *et seq.* of the Education Code of the State of California provides that school auditoriums must be open to the use of certain groups. The statute provides that a body seeking the use of this privilege must sign an affidavit that it does not have Communistic principles. A group sought the use of the auditorium, but refused to sign the affidavit. The California Supreme Court held the requirement of the affidavit to be unconstitutional. The Supreme Court of the United States has since invalidated the decision.

United States v. Classic (1941), 313 U. S. 299, 85 L. Ed. 1368, is a criminal prosecution for election fraud in the election of a United States Senator. It is not in point by any stretch of the imagination.

In *Screws v. United States* (1944), 325 U. S. 91, 89 L. Ed. 1495, it is alleged that a Sheriff and his deputies arrested a negro for petty theft, handcuffed him and then beat him to death. The suit is based upon the premise that he was entitled to due process of law before his life was taken by authorities.

The *Westminster School District v. Mendez,* 161 F. 2d 744 (C. C. A. 9th), is a case where the District refused to permit a child of Mexican descent to attend a white school in admitted violation of a California Statute.

The case of *International News v. Associated Press* (1918), 248 U. S. 215, 63 L. Ed. 211, is interesting for the reason that it holds that news, once collected, is property until a reasonable time after its release to the public. The entire theory of the case is based upon the proposition that one who has spent energy and money collecting news and has COLLECTED it, has a property right in the news, and piracy of the COLLECTED news may be enjoined. The case would seem to be authority supporting the exclusive right of KVOE to its private wire.

The case of *Ex parte Virginia* (1897), 100 U. S. 339, 25 L. Ed. 667, merely holds that a defendant is entitled to a trial by an impartial jury and is not, as a matter of constitutional right, entitled to a trial by a jury on which the colored race is represented.

The following cases cited by appellant are likewise of no value whatsoever for the reason that they merely hold there cannot be discrimination because of race or color:

Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208;

Westminster School District of Orange County v. Mendez, 161 F. 2d 774 (C. C. A. 9th);

Lopez v. Seccombe, 71 Fed. Supp. 769 (D. C. So. D. Calif.);

Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (C. C. A. 4th);

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 89 L. Ed. 173.

Conclusion.

There is no decision that remotely suggests that a public officer is required to give equal rights in disclosing news. Such a holding would be disastrous to news agencies themselves, as in many cases exclusive coverage would be impossible. Giving one news service information without giving it actively to all others would be tantamount to discrimination. Appellees very earnestly contend that to permit this case to go to trial on the facts would in itself create an extremely dangerous precedent and that any official giving an interview would place himself in the position of being subject to suit. Furthermore, it is submitted that every dissatisfied litigant would have the right to ask the Federal Court to retry his law suit without regard for the Appellate Court of the State. It is respectfully submitted that the judgment of the United States District Court is correct, and should be affirmed.

Respectfully submitted,

Otto A. Jacobs,
Attorney for Appellee Kenneth E. Morrison.

R. M. Crookshank,
Attorney for Appellee The Voice of the Orange Empire, Inc., Ltd.

No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

PAGE

I.

Reply to appellees' contention that "the complaint fails to state a cause of action" 1

II.

Reply to appellee's proposition that "it appears from the complaint that there is no federal question involved" 8

III.

Reply to appellee's contention that "judges are exempt from civil suit" 10

IV.

Reply to appellee's contention that "authorities cited by plaintiff are not in point" 11

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Alesna v. Rice, 74 Fed. Supp. 865	10
Alston v. School Board of City of Norfolk, 112 F. 2d 992	4
Bradwell v. Illinois, 83 U. S. 130, 21 L. Ed. 442	2
Burt v. City of New York, 156 F. 2d 791	3, 4, 9, 10
Classic case, 313 U. S. 299, 85 L. Ed. 1368	12
Danskin case, 28 Cal. 2d 536	11
Emmons v. Smitt, 149 F. 2d 869	2
Hannegan v. Esquire, 327 U. S. 146, 90 L. Ed. 586	11
International News Service v. Associated Press, 248 U. S. 215, 63 L. Ed. 211	12
Lamar Pub. Co. v. Hoag, 131 Pac. 400	5
Lane v. Chandler, 124 F. 2d 785	8
Lockwood, In re, 154 U. S. 116, 38 L. Ed. 929	2
Mitchell v. Greenough, 100 F. 2d 184	2
Screws case, 325 U. S. 91, 89 L. Ed. 1495	12
Snowden v. Hughes, 321 U. S. 1, 88 L. Ed. 497	9
United States v. Mozley, 238 U. S. 383, 59 L. Ed. 1355	8, 9
Westminster School District of Orange County v. Mendez, 161 F. 2d 774	5, 9, 12
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220	4

Statutes

United States Constitution, Fourteenth Amendment	2, 6

No. 12047

IN THE

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Appellees.

APPELLANT'S REPLY BRIEF.

I

Reply to Appellees' Contention That "the Complaint Fails to State a Cause of Action." [Reply Br. pp. 3-11.)

Appellees divide their argument as to this topic under two separate headings, the first a contention that KFI had no civil right to broadcast from the courtroom and the second that it had no right to use the Judge's chambers or KVOE's private wire.

In our opening brief we developed at some length the question of the interest involved (App. Op. Br. pp. 8-20), and of the duty of a State when it makes available privi-

leges to its citizens to insure that such privileges are granted to its citizens upon a basis of equality of right.

Appellees reply to these cases in part IV of their brief (Reply Br. pp. 17-18) and dispose of these cases for the most part by the simple expedient of classification and the statement, without exposition, that they are not in point. In Part I of their brief, for the proposition that no civil right or privilege protected by the constitution is here involved, appellees cite two lines of cases to establish their contention. One set of cases deals with the right to practice law in State courts and the other deals with the enforcement of public duty.

Cases of the first class are *Mitchell v. Greenough,* 100 F. 2d 184 (Reply Br. pp. 3-4), and *Emmons v. Smitt,* 149 F. 2d 869. (Reply Br. p. 4.)

The rule that the right to practice law in the State court is not a privilege granted by the Federal Constitution and laws was established initially by the case of *Bradwell v. Illinois,* 83 U. S. 130, 21 L. Ed. 442, a case which held that woman who was denied the right to practice law in Illinois had no redress under the "privileges and immunities" clause of the Constitution.

A similar ruling with reference to a statute of Virginia is to be found in *In re Lockwood,* 154 U. S. 116, 38 L. Ed. 929. The *Lockwood* case emphasizes that the issue arises under the privilege and immunities clause of the Constitution and was not enlarged by the 14th Amendment. The question of denial of equal protection is not discussed in either case.

The two cases cited by appellees, the *Mitchell* and the *Emmons* cases (Reply Br. pp. 3-4) follow these rulings.

With these cases we have no quarrel. They recognize the authority of a State to prescribe reasonable rules and regulations for admission to the bar of the State without supervision by the federal government. We see no analogy between such cases and the present case. We submit, however, that if there were an arbitrary discrimination in the application of the rules and regulations, then a federal right would arise for which redress could be found in a federal court. The distinction is not the question of the duty of a State to admit persons to practice law in the State, but is of its duty when it does determine to admit persons to the practice of law to see that such admission is on the basis of an equality of right. Had appellees cited cases approving arbitrary discrimination between applicants similarly situated we believe that then and only then would they have presented cases that are in point on the issue here before the court.

Illustrative of the discussion is the comparatively recent decision of Judge Learned Hand in the case of *Burt v. City of New York,* 156 F. 2d 791 (C. C. A. 2nd). Burt brought an action under the Civil Rights Act against the City of New York, the "Board of Standards and Appeals," the "Department of Housing and Building," the "Commissioner of Buildings," the "Borough Superintendent," and the Chief Engineer and two examiners of the Building Department. Apparently, Burt's contentions were that these defendants in many instances deliberately misinterpreted and abused their statutory authority by denying applications which he, a "registered architect," had submitted to these bodies, or by imposing unlawful conditions on his applications. He charged that these defendants selected him for these oppressive measures,

while unconditionally approving the applications of other architects similarly situated. He asserted that he was the victim of a "purposeful discrimination." Judge Hand ruled that Burt had stated a cause of action. It will be noted that in the complaint on file here a wilful, intentional, invidious and purposeful discrimination was charged repeatedly (note Paragraphs VIII, IX, XIII of the First Cause of Action, and Paragraphs II and IV of appellants' Second Cause of Action, and Paragraph X which sets out specific acts of the Judge evidencing malice (App. Op. Br. pp. 6-12).)

It is, of course, obvious that it is purely a state function for a building department of a city to determine what standards of construction are to be adhered to in that city. It is equally the function of the state to set standards for admission to the bar. So long as such standards are reasonably prescribed and enforced, no Federal question arises. But when there is found an intentional discrimination as to persons in the same class, then a cause of action arises under the Civil Rights Act, which we understand is the express ruling of the *Burt* case. (The *Burt* case is, after all, simply an application of the rule of *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220. See, also *Alston v. School Board of City of Norfolk,* 112 F. 2d 992 (C. C. A. 4th).) And in the instant case, we submit that a cause of action arises under the Civil Rights Act when a State court opens its courtroom to radio broadcasting to the citizens of the State, if there is arbitrary discrimination between persons of the same class as to the right to use such privilege.

Counsel's second type of case deals with the question of whether a private right is created for a public wrong,

citing as its principal authority *Lamar Pub. Co. v. Hoag,* 131 Pac. 400. (Reply Br. p. 5.) These cases hold that where a statute is intended for the benefit of the public, though certain members of the public may incidentally benefit thereby, redress for breach of the statute is by public prosecution of some kind and not by private action maintained by the person or persons incidentally benefited. KFI is not here attempting to force Judge Morrison as a judge to perform any duties he owes to the public at large; rather KFI has alleged a purposeful, arbitrary and intentional discrimination and denial to KFI of the right to enter his courtroom for the purpose of radio broadcasting, after he had opened his courtroom to such broadcasts. In short, the line of authorities cited by counsel deals with the steps to be taken for redress against the sins of omission. Here KFI is seeking relief from a deliberate act of commission.

As a practical matter, the public wrong cases if held applicable to a civil rights action would effect a nullification of the Act. Any action involving a public official brought under the Civil Rights Act could be avoided by the defense that even if the official had unlawfully discriminated no remedy was available to the victim of the discrimination. The sole redress would be public prosecution brought by public authorities. Thus in the case of *Westminster School District of Orange County v. Mendez,* 161 F. 2d 774 (C. C. A. 9th) . . . where this Court ruled that children of Mexican descent could not

be barred from public schools used by white children and where such restriction was found contrary to California law . . . instead of granting relief as was done, under the rule urged by appellees this Court would have been required to dismiss the case for the reason that the Attorney General of the State of California possessed the power to bring a proceedings against the School District for dereliction of duty.

By way of a general summary of the right here involved we would like to emphasize the following points.

Equal protection of the laws applies to privileges and rights given as well as serving as a shield against attempts to take away such rights. Any right that comes within the protection of the equal protection clause of the 14th Amendment can be made actionable under a proper set of facts in a suit brought under the Civil Rights Act. That is to say, the Civil Rights Act does not enlarge or take away the protection granted by the 14th Amendment. Its sole purpose is to create a cause of action to enforce the amendment where state action is involved. In short, there are not two standards for the determination of a denial of equal protection to be met in a suit under the Civil Rights Act.

Any case that is authority for a denial of equal protection is, as a consequence, an authority for a Civil Rights case for the purpose of determining the nature of the right involved, and for determining whether it can be made the subject matter of a suit in a Federal Court.

We submit that such a cause of action was here clearly stated and cite as authorities the cases presented in our opening brief.

Little comment would seem necessary to dispose of appellee's proposition that KFI had no right to the use of Judge Morrison's chambers or to the KVOE private wire. We have not contended it has. It was suggested in our opening brief (App. Op. Br. pp. 18-19), that a judge, who opens his courtroom to broadcasting, may impose such restrictions on the exercise of the right as will reasonably be calculated to insure proper court decorum, so long as in doing so there is no discrimination among those persons who desire to avail themselves of the right. By way of one example we suggested that a judge might condition his approval on a pooling plan where all would take from one set of microphones in the courtroom. There are, of course, other methods. By this suggestion we did not contend that KVOE was required to turn over its property to KFI or to anyone else. This is a straw man of appellee's creation, not ours.

The allegations of our complaint with reference to KMPC are for the purpose of showing further intentional and deliberate discrimination against KFI by Judge Morrison. We have no criticism as such of the judge's permission to KMPC to use his chambers. From an evidentiary standpoint we do believe that this solicitude on the part of Judge Morrison to insure the success of KMPC's broadcast is but another facet in the judge's discrimination as to KFI.

II.

Reply to Appellee's Proposition That "It Appears From the Complaint That There Is No Federal Question Involved." (Reply Br. pp. 12-13.)

This proposition of appellees is but another approach to the general point, was there a denial of equal protection. The authorities cited are in point on the obvious rule that if a denial of equal protection is not alleged in the complaint, it is defective under the Civil Rights Act.

Appellees cite two cases in this portion of their brief as authority for the statement that the Civil Rights Statutes do not make Federal questions of every departure from State law. These cases are *Lane v. Chandler,* 124 F. 2d 785, and *United States v. Mozley,* 238 U. S. 383, and 59 L. Ed. 1355.

In the *Lane* case plaintiff sued on a theory of conspiracy to prevent him from having and holding employment under W.P.A. The Court pointed out that plaintiff sought no redress because the State of Minnesota discriminated against him or because its laws fail to afford him equal protection. It then pointed out that there is no absolute right under the laws of the United States to have or retain employment in the W.P.A. The Court then said that the case was a suit where certain persons, as individuals, are alleged to have conspired to injure plaintiff by individual and concerted action.

The Civil Rights Statute reads in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." (8 U. S. C. A. 43.)

As the element of State action is not present in the *Lane* case, it involved a set of facts not analogous to the case at bar.

United States v. Mosley, 238 U. S. 383, 59 L. Ed. 1355, is favorable to appellees in the dissenting opinion only. The majority opinion written by Mr. Justice Holmes holds that a conspiracy of State election officials to omit the returns of certain precincts at an election for members of Congress from their counts and from their return to the State election board is indictable under a Statute making it a crime to conspire or injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by him by the Constitution or laws of the United States.

Even assuming that we have failed in stating a cause of action, nevertheless, this case should not be dismissed for want of jurisdiction. If dismissed at all, it should be for failure to state a cause of action. We have endeavored to allege a cause of action within the Civil Rights Statute. Such a cause of action is within the jurisdiction of the District Court. If we fail so to allege it is not a failure for want of jurisdiction, but is rather a failure to state a cause of action under the Statute.

In our complaint we followed rather carefully the pleading approved by this Court in *Westminster School District of Orange County v. Mendez,* 161 F. 2d 774, and the requirements of a proper pleading of a Civil Rights case, as set forth in *Snowden v. Hughes,* 321 U. S. 1, 88 L. Ed. 497. Attention is also called to the pleading requirements of a Civil Rights Act case as set out by the United States Court of Appeals for the Second Circuit in *Burt v. City of New York,* 156 F. 2d 791, which case predicates its views on the rules ennunciated in the *Snowden* case. It is believed we have met the standards laid down in those decisions.

III.

Reply to Appellee's Contention That "Judges Are Exempt From Civil Suit." (Reply Br. pp. 14-16.)

This point was covered in our opening brief (App. Op. Br. pp. 25-29), and appellees raise no new cases in reply. Since the writing of that portion of the brief we have found two additional authorities recognizing the rule that a judge is not exempted from civil suit under the Civil Rights Act.

In *Burt v. City of New York,* 156 F. 2d 791, discussed *supra*, one of the points made was that appellant had not exhausted his remedies. It was stated that when the various boards turned down plaintiff's application he had a remedy of certiorari to the Supreme Court of the State of New York and that plaintiff had not pursued this remedy. The Circuit Court of Appeals agreed that such failure might bar an injunction in this case, but said (p. 793):

> "However that may be, clearly it is not an effective substitute for the damages which the plaintiff may have suffered from the subordinate officers whom he has made defendants, or from the Board itself. The risk of a recovery against them for these does on its face appear substantial; and indeed in Picking v. Pennsylvania R. Co., *supra* (3 Cir., 151 F. 2d 240), it was held that the 'Civil Rights Act' actually tolled the privilege of a judge."

In *Alesna v. Rice,* 74 Fed. Supp. 865 (Dist Ct. of Hawaii), the Court, following the *Picking's* case, held in a Civil Rights case that it was proper to include a Territorial Circuit Judge as a defendant.

IV.

Reply to Appellee's Contention That "Authorities Cited by Plaintiff Are Not in Point." (Reply Br. pp. 17-18.)

Every case listed in this portion of appellee's brief are cases cited in our opening brief presenting factual situations from which the court found that there was a denial of equal protection of the law. We submit that each case so cited is analogous as to the law, though the facts of course, differ.

Appellee dismisses these cases by classification and by the statement that they are not in point.

Hannegan v. Esquire, 327 U. S. 146, 90 L. Ed. 586, is dismissed as a simple case of censorship. It was all of that. But the Supreme Court pointed out that this censorship was accomplished as a result of a denial of equal protection. There is likewise censorship presented in this case, an even more vicious type than that of the *Hannegan* case. There the censorship resulted in freezing the dissemination of news. Here the censorship froze the news at its source.

The *Danskin* case, 28 Cal. 2d 536, is waived aside with the statement, unsupported by citation, that the Supreme Court has invalidated the decision. Presumably counsel are referring to the requirement of an affidavit as to political views. If that is their reference, the fact that the Supreme Court may have indicated in the labor field that a labor union may be required to file such an affidavit certainly in no wise questions the point for which the case was cited, namely, that when a state offers a privilege to its citizens it must do so on a non-discriminatory basis.

The *Classic* case (313 U. S. 299, 85 L. Ed. 1368), and the *Screws* case (325 U. S. 91, 89 L. Ed. 1495) were cited under a discussion of the meaning of the term "color of law" as used in the Civil Rights Act (App. Op. Br. p. 24), and they are, with *Westminster School District v. Mendez* (161 F. 2d 744), the leading cases on the question of color of law.

The *Westminster* case is dismissed by appellees with the statement that it was a case where a "District refused to permit a child of Mexican descent to attend a white school in admitted violation of a California Statute." (Reply Br. p. 18.) The fact that the *Westminster* case was brought under the Civil Rights Act and held that there had been a denial of equal protection of the law is overlooked by appellees.

International News Service v. Associated Press, 248 U. S. 215, 63 L. Ed. 211, was cited by KFI for the proposition that the occupation of gathering news is a property right which the Courts will protect. (App. Op. Br. pp. 20-21.) Appellees apparently concede this proposition. They believe the case to be interesting as an authority for KVOE having an exclusive right to its private wire, a proposition we have not questioned. (Reply Br. p. 18.)

The remainder of the cases considered by Appellee, some six in number, are waived aside by the simple expedient of stating that they involve discrimination because of race or color, hence can be of no value here. KFI is here before the Court charging defendants with discrimination. True a race question is not involved, but a discrimination question, the gravamen of denial of all equal protection cases is involved, and we submit that each such case presenting as it does a different aspect of discrimination is

authority for and in point with the case at bar, each holding that the courts of the United States stand ready under the Constitution to suppress discrimination wherever and in what disguise it is found to exist.

In conclusion we again submit that if any branch of the State is to be held to a high standard of fairness and impartiality, and where discrimination should be first rooted out, it should be in our judicial system. We respectfully urge this Court to rule that a good cause of action was here stated and within the jurisdiction of the Federal Court.

Respectfully submitted,

OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE,
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No. 12048

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ROSSELLI,

Appellant.

vs.

ROBERT E. CLARK, United States Marshal for the Southern District of California,

Appellee.

TRANSCRIPT OF RECORD

Appeal From the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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INDEX

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Page

Appeal:

Notice of 19

Points on Which Appellant Intends to Rely on (Court of Appeals) 21

Certificate of Clerk 20

Names and Addresses of Attorneys 1

Notice of Appeal 19

Order Dismissing Petition for Writ of Habeas Corpus 16

Order re Custody of Petitioner 18

Order to Show Cause 9

Petition for Writ of Habeas Corpus 2

Points on Which Appellant Intends to Rely on Appeal (Court of Appeals) 21

Return to Order to Show Cause 10

Exhibit A. Warrant Duly Issued by Fred S. Rogers, Member, United States Board of Parole, Directing Arrest of John Rosselli 12

Exhibit B. Letter to Robert E. Clark From Frank Loveland, Dated July 21, 1948 14

Exhibit C. Document Accompanying Warrant and Letter, Dated July 21, 1948 14

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California
Central Division

8483-Y

UNITED STATES OF AMERICA, ex rel., JOHN ROSSELLI,

Petitioners,

vs.

ROBERT E. CLARK, Marshal,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Peirson M. Hall, District Judge:

The petitioner, John Rosselli, by Frank Desimone, his next friend, and at said John Rosselli's request, presents this his petition for Writ of Habeas Corpus and shows unto the Court:

I.

That the petitioner is a citizen and resident of the City of Los Angeles, County of Los Angeles and of the State of California, Southern District of California, Central Division, and of the United States of America.

II.

That the petitioner is being restrained illegally by colour of the authority of the United States and in the custody of Robert E. Clark, United States Marshal, in the Southern District of California; that is to say that said petitioner is being illegally restrained by virtue of a purported warrant asserting that reliable information exists that the petitioner has violated parole granted him on a sentence and judgment imposed against him [2]

by the United States District Court, Southern District of New York.

III.

That the indictment upon which he was convicted in said District Court of New York and upon which sentence was imposed and subsequently parole was granted consisted of one count and charges that your petitioner conspired with Bioff, Browne, others, and persons unknown to violate Section 420, 18 U. S. C. A.

IV.

The petitioner was sentenced to serve ten years in the penitentiary and to pay a fine. The fine was paid. The judgment was affirmed by the *District* Court and certiorari denied by the Supreme Court. After the petitioner served one-third of the sentence imposed, parole was granted. That at the time said petitioner was paroled he was incarcerated in the United States penitentiary at Terre Haute, Indiana.

V.

The petitioner by and through his next friend, Frank Desimone, alleges on his information and belief that the petitioner John Rosselli forthwith upon his release from Terre Haute Penitentiary proceeded to the City of Los Angeles; that the said John Rosselli had assigned to him as his parole officer to whom he would be accountable to and to whom he would make his reports and under whose supervision and direction and instructions he would be subjected to was Cal Meador; that the said John Rosselli has continuously since his release from the penitentiary resided and lived in the City of Los Angeles; that he has faithfully and fully complied with each and every condition of his parole; that he has fully and completely obeyed

all of the directions and instructions of his parole officer, Cal Meador; that he has in no degree and in no particulars violated any of the conditions of his parole; that immediately upon his return to Los Angeles he engaged in gainful [3] employment with the Eagle Lion Studios of Los Angeles as Assistant Purchasing Agent at a salary of $50.00 a week; that he was so employed as Assistant Purchasing Agent at said Studios for a period of approximately six months, and thereafter, until on or about the middle of June, 1948, he was an assistant to Robert T. Kane of Robert T. Kane Productions, Inc. in the production of the picture, "Canon City" and of "29 Clues" at a salary of $150.00 a week and an 14/64 interest of 50% in said pictures. That the picture "Canon City" has now been released and is being shown currently in the theatres of the country, and the picture "29 Clues" has been completed subject to some slight revisional retakes; that it is expected that said picture will be released in the late summer or early fall of this year; that for a period of two weeks in June the petitioner was not employed, and on July 1 was employed by Bryan Foy, formerly production head of Eagle Lion Studios, and now under contract to produce four pictures a year at said studios; that the said petitioner, John Rosselli, as such assistant to Bryan Foy is receiving a salary from said Bryan Foy of $100.00 a week; that said John Rosselli has been on parole for approximately one year; that his parole officer, Cal Meador, at no time has admonished or advised said John Rosselli that he was in violation of his parole; that said Cal Meador has not advised nor informed the parole board of the United States, or the Attorney General, that the said John Rosselli was or is in violation of any conditions of his parole, nor has he recommended revocation thereof.

VI.

The petitioner is informed and believes and therefore alleges that under the rules and regulations governing the procedure of the United States Board of Paroles that warrants of arrest for alleged violations of parole may and can only be issued upon "reliable" information received from and furnished by the supervising parole officer of the area responsible for the supervision of the parolee; [4] that no cause or legal reason exists for the issuance of a warrant of arrest of said John Rosselli with the violation of his parole; that said warrant has been issued without any information of violation or alleged violation of his parole; that said warrant of arrest was issued arbitrarily and capriciously and without any cause, ground or reason.

VII.

The petitioner by and through his next friend, Frank Desimone, on his information and belief, alleges that since the parole of said John Rosselli a committee of Congress conducted an investigation; that said legislative committee searched for evidence of corruption and undue influence on the matter of the granting of parole to certain other defendants convicted. No such evidence was obtained, but the hearings were made use of in an apparent effort to discredit the Democratic Administration and the Parole Board and the Attorney General in particular; that parole officers were questioned for the purpose of demonstrating that parole should not have been granted and every effort was made by the Chairman of the Congressional Committee to compel the members of the Parole Board to revoke the paroles. The personnel of the Parole Board has been changed because of death and resignation since the paroles were granted, and new

members have been furnished a transcript of the hearings and the Committee has demanded revocation; that members of the Parole Board have testified before the Congressional Committee that action will be taken on the paroles of said parolees; said parolees have requested a hearing before any such action, but such a hearing has been refused.

VIII.

The petitioner by and through his next friend, Frank Desimone, is informed and believes and therefore alleges the fact to be that said petitioner has repeatedly and constantly sought [5] the advice and approval of his said supervising parole officer regarding his business and social life and has acted only in accordance with the approval had and obtained from said parole officer; that the said John Rosselli sought the advice of his parole officer as to whether or not he was obliged to register as a felon in the communities in which he resided or visited whose laws required such registration and was advised that he did not have to so register while on parole for the reason that he was a ward of the United States Government; that the said John Rosselli socially and in business and otherwise associated only with persons of the highest integrity and honesty and never associated even secretly and covertly with persons of bad repute or who had been convicted of crime; that said John Rosselli reported truthfully and honestly all of his business activities, income and expenditures; that all of the persons with whom he lived with, met and associated with daily during the period of his parole and which in number constiutes many all reside and live in the Southern District of California and are available here as witnesses under the process of the Court to establish that the warrant issued

by the Parole Board was arbitrary and capricious and without cause, ground or reason, whereas none of said persons would be available by process to appear before the Parole Board, even though the petitioner could meet such expense, which he cannot, out of the meager savings accumulated by him.

IX.

As the next friend of the petitioner, John Rosselli, Frank Desimone states that he has had occasion many times to discuss with the said John Rosselli the facts and circumstances concerning the charge in the indictment. The said John Rosselli has at all times asserted and maintained that he was not guilty of said offense; further, that the said John Rosselli has stated and it so appears in the transcript of testimony of trial uncontra- [6] dicted that throughout the period of time involved in said indictment said John Rosselli resided in the State of California and was employed in the capacity of a labor agent by Pat Casey. Chairman of the Motion Picture Producers Labor Relations Association; that said John Rosselli was not associated in any manner with any of the other defendants; and that as said labor agent for the said Pat Casey he through the years bitterly opposed, and denounced Bioff and Browne, the national representatives of the IATSE, with whom it was alleged in said indictment the defendants conspired to extort money from the motion picture industry, to a point that Bioff threatened his life.

X.

The petitioner by and through his next friend, Frank Desimone, is informed and believes and therefore alleges the fact to be that the United States Marshal proposes forthwith to remove the petitioner, John Rosselli, from the jurisdiction of the Court.

Wherefore: the petitioner prays that a Writ of Habeas Corpus may be directed to the said United States Marshal, Robert E. Clark, and to each and all his deputies to bring in and to have the petitioner before this Court and at a time to be by this Court determined, together with the true cause of the detention of the petitioner, to the end that due inquiry may be had in the premises, or in the alternative to issue its order directed to the United States Marshal and his deputies aforesaid to be and appear before this Court and at a time to be by this Court determined to show cause why said Writ of Habeas Corpus prayed for should not issue, and that this Court in the event that it elects in the alternative to issue its order to show cause that the said United States Marshal and each and all of his deputies be directed and restrained from removing said petitioner from the jurisdiction of this Court pending the determination of the proceedings herein; and that this Court may proceed in the summary way to determine [7] the facts of this case in that regard and the legality of the petitioner's impairment, restraint, and detention, and thereupon to dispose of your petitioner as law and justice may require.

JOHN ROSSELLI
By Frank Desimone
His Next Friend

FRANK DESIMONE and OTTO CHRISTENSEN
Attorneys [8]

[Verified by John Rosselli.] [9]

[Verified by Frank Desimone.]

[Endorsed]: Filed Jul. 27, 1948. Edmund L. Smith, Clerk. [10]

[Title of District Court and Cause]

ORDER TO SHOW CAUSE

To the Above Named Robert E. Clark, United States Marshal, and to His Agents and Deputies:

Upon reading the Complaint and Petition for Writ of Habeas Corpus, It Is Hereby Ordered that Robert E. Clark, United States Marshal for the Southern District of California, Central Division, and each and all of his Judge Ben Harrison of [P.J.M., J.] deputies, be and appear before ∧ ~~the~~ above entitled Court on the 2nd day of August, 1948 at the hour of 2 P. M. and to have the body of John Rosselli by you imprisoned at said time and place, then and there to show cause, if any you have, why the Writ of Habeas Corpus prayed for should not issue; and you are hereby enjoined and restrained from removing said petitioner, John Rosselli, from the jurisdiction of this Court until the final deter-termination of the proceedings before this Court.

Dated: July 27, 1948, at 11 A. M.

PAUL J. McCORMICK
Judge of the District Court

[Endorsed]: Filed Jul. 27, 1948. Edmund L. Smith, Clerk. [11]

[Title of District Court and Cause]

RETURN TO ORDER TO SHOW CAUSE

I, Robert E. Clark, United States Marshal for the Southern District of California, respondent herein, on behalf of myself and each and all of my deputies, respectfully make the following return to this Honorable Court to the order to show cause issued pursuant to the petition for writ of habeas corpus in the above case:

I.

That John Rosselli, hereinafter referred to as the petitioner, is not being illegally restrained by me of his liberty, but is in my custody under proper and lawful authority.

(a) That petitioner was taken into custody on July 27, 1948, at Los Angeles, California, within the Southern District of California, Central Division, under authority of a warrant duly issued by Fred S. Rogers, Member, United States Board of Parole, directing petitioner's arrest. That there is [12] attached hereto, as a part of this return and marked Exhibit "A," a photostatic copy of the said warrant; that the original of said warrant will be made available at such time and place as this Honorable Court shall direct.

(b) That said warrant was received in, and together with, a letter dated July 21, 1948, addressed to your respondent, and signed by Frank Loveland, Acting Director, Bureau of Prisons, by direction of the Attorney General; that a photostatic copy of said letter is attached hereto, as a part of this return, and marked Exhibit "B." That likewise accompanying said warrant and said letter last referred to, and enclosed therewith, was a document, a

photostatic copy of which, marked Exhibit "C," is attached hereto as a part of this return. That the originals of said Exhibit "B" and Exhibit "C" will be made available at such time and place as this Honorable Court shall direct.

II.

That the petition for writ of habeas corpus herein fails to state a claim or cause of action upon which relief may be granted:

(a) That this Honorable Court is without jurisdiction to inquire into and to review the action of a Member of the United States Board of Parole, in issuing a parole violator's warrant pursuant to Section 717 of Title 18, United States Code.

(b) That this Honorable Court is without jurisdiction to inquire of and into the custody of the petitioner held under a parole violator's warrant, regular on its face, until after the United States Board of Parole has held a hearing in accordance with the provisions of Section 719 of Title 18, United States Code.

(c) That the petition for writ of habeas corpus herein seeks to review the original judgment of conviction of petitioner as by appeal.

(d) That the petition for writ of habeas corpus herein seeks to attack, collaterally, the original judgment of conviction entered against the petitioner and others by the United States District Court for the Southern District of New York. [13]

Wherefore, the respondent, Robert E. Clark, United States Marshal for the Southern District of California, having made due and full return to the order to show cause heretofore issued herein, pursuant to the petition

for writ of habeas corpus, respectfully prays that the petition for writ of habeas corpus be dismissed and that the petitioner, John Rosselli, be remanded to respondent's custody, to be dealt with according to the laws of the United States of America.

ROBERT E. CLARK
United States Marshal

[Verified.] [14]

EXHIBIT "A"

Parole Form No. 20
(March 1937)

[Stamped]: Marshal's Criminal Docket No. 65004, Vol. 128, page 74.

DEPARTMENT OF JUSTICE
(Original) Washington, D. C.
[Crest]

WARRANT

The United States Board of Parole

To Any Federal Officer Authorized to Serve Criminal Process Within the United States:

Whereas, John Roselli, No. 4305-TH, was sentenced by the United States District Court for the Southern District of New York to serve a sentence of ten years, ... months, and ..... days for the crime of Violation of Anti-Racketeering Act, Title 18, Section 420-A, U. S. Code, and was on the thirteenth day of August, 1947, released on parole from the United States Penitentiary, Terre Haute, Indiana

And, Whereas, reliable information having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, and the said paroled prisoner is hereby declared to be a fugitive from justice;

Now, Therefore, this is to command you to execute this warrant by taking the said John Roselli, wherever found in the United States, and him safely return to the institution hereinafter designated.

Witness my hand and the seal of this Board this 21st day of July, 1948.

(Seal) Fred L. Rogers
Member, U. S. Board of Parole. [15]

Warrant for Return of Paroled Prisoner .....
No. ..... (Institution)

United States Marshal's Return to United States Board of Parole, Sou. District of Calif., ss:

Received this writ the 23 day of July, 1948, and executed same by arresting the within-named John Roselli this 27 day of July, 1948 at Federal Bldg., Los Angeles, and Committing him to G. V. Rossini. ....., U. S. Marshal. By ....., Deputy Marshal.

Note.—This original warrant to be returned to U. S. Board of Parole, Washington, D. C. [16]

EXHIBIT "B"

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
Washington 25

July 21, 1948

Mr. Robert E. Clark
United States Marshal
Los Angeles, California

Dear Marshal Clark:

The United States Penitentiary, McNeil Island, Washington, is designated as the place of confinement for John Roselli, No. 4305-TH, parole violator.

Sincerely yours,

By direction of the Attorney General
Frank Loveland
FRANK LOVELAND
Acting Director, Bureau of Prisons. [17]

EXHIBIT "C"

DEPARTMENT OF JUSTICE
UNITED STATES BOARD OF PAROLE
Washington

U. S. Marshal,
Los Angeles, California

Air Mail
Date July 21, 1948
Case of John Roselli,
No. 4305-TH
Warrant issued July 21,1948*

Dear Sir:

Enclosed is copy of Referral for Consideration of Alleged Violation, and warrant in duplicate, issued by the United States Board of Parole for the above-named prisoner.

1. If the prisoner is facing a local charge, in jail or on bond, place your detainer and notify this office. If he has been sentenced to a State institution, place your detainer and notify this office.

2. If he is held on a new Federal charge, place your detainer, and notify this office before execution of the warrant. If he is sentenced on the new Federal charge, return this warrant unexecuted.

3. If the prisoner is now a fugitive, but later located, the same procedure outline above should be applied.

4. If the prisoner is not wanted on a current charge, and is not in custody or on bond, the warrant should be executed immediately.

Very truly yours,

Walter K. Urich
Parole Executive.

Copy to:

Mr. C. H. Meador
Chief United States Probation Officer
Post Office Building
Los Angeles 12, California

---

*Probation officer: Please drop from records as of this date. (State known persons and places which will aid in apprehension.)

Note.—When prisoner is returned to the designated institution, leave Referral and one warrant with warden. Make your return on the other warrant to the Board of Parole, Washington, D. C.

[Endorsed]: Filed Jul. 27, 1948. Edmund L. Smith, Clerk. [18]

In the District Court of the United States in and for the Southern District of California
Central Division

No. 8483-Y Civil

UNITED STATES OF AMERICA, ex rel, JOHN ROSSELLI,

Petitioner,

vs.

ROBERT E. CLARK, Marshal,

Respondent.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING MOTION TO PRODUCE

This cause came on regularly for hearing in the above entitled court on August 2, 1948, August 20, 1948, and September 7, 1948, before Honorable David C. Ling, Judge Presiding, on the Order to Show Cause issued pursuant to the Petition for Writ of Habeas Corpus of John Rosselli, petitioner herein, and the Motion to Produce filed by said petitioner, and on the Return to said Order to Show Cause by Robert E. Clark, United States Marshal for the Southern District of California, respondent herein, praying that said Petition for Writ of Habeas Corpus be dismissed for failure to state a claim or cause of action upon which relief may be granted and that the petitioner be remanded to respondent's custody to be dealt with according to the laws of the United States of

America. Petitioner was personally present and represented by Otto Christensen, Esq. and Frank Desimone, Esq., his attorneys. Respondent was represented by James M. Carter, United States Attorney, by Norman W. Neukom, Assistant United [19] States Attorney, and Tobias G. Klinger, Assistant United States Attorney. The Court having heard the arguments of counsel, and briefs having been submitted on behalf of both petitioner and respondent, and upon due consideration thereof, the Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the Order to Show Cause herein be, and the same is, hereby discharged and the Petition for Writ of Habeas Corpus herein be, and the same is, hereby dismissed;

It Is Further Ordered, Adjudged and Decreed that the Motion to Produce filed by the petitioner herein be, and the same is, hereby denied.

Dated: This 8 day of September, 1948.

DAVID C. LING
United States District Judge

Exception allowed. D. C. L.

Approved as to form: Otto Christensen.

Judgment entered Sep. 8, 1948. Docketed Sep. 8, 1948. Book 52, page 635. Edmund L. Smith, Clerk; by L. B. Figg, Deputy.

[Endorsed]: Filed Sep. 8, 1948. Edmund L. Smith, Clerk. [20]

[Title of District Court and Cause]

ORDER

On reading of the Motion of the Appellant, John Rosselli, for an Order pursuant to Rule 29(1) of the Rules of Civil Procedure of the United States Circuit Court of Appeals for the Ninth Circuit, and his Notice of Appeal,

It Is Ordered that the custody of the petitioner, John Rosselli, shall not be disturbed and that he be retained by the respondent in the jurisdiction of this Court until the final determination of the appeal herein.

Dated: September 8, 1948.

DAVID C. LING
Judge

Approved as to form: T. G. Klinger, Asst. U. S. Atty.

[Endorsed]: Filed Sep. 8, 1948. Edmund L. Smith, Clerk. [21]

[Title of District Court and Cause]

NOTICE OF APPEAL

Name of Appellant: John Rosselli, residing at 3900 Ingraham Street, Los Angeles, California.

Attorneys for Appellant: Otto Christensen and Frank Desimone, 541 South Spring Street, Los Angeles, California.

Judgment: Discharging order to show cause why writ of habeas corpus should not issue and dismissing Appellant's Petition for the writ of habeas corpus; said judgment was entered on Sept. 8th, 1948. Defendant is in the custody of the United States Marshal of said District.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals, Ninth Circuit, from the judgment above mentioned on the grounds set forth below.

Dated: Sept. 8, 1948.

JOHN ROSSELLI [22]

GROUNDS OF APPEAL

* * * * * * * * *

OTTO CHRISTENSEN and
FRANK DESIMONE
By Frank Desimone

Received copy of within Notice of Appeal Sept. 8, 1948. T. G. Klinger, Asst. U. S. Atty.

[Endorsed]: Filed Sep. 8, 1948. Edmund L. Smith, Clerk. [24]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 25, inclusive, contain full, true and correct copies of Petition for Writ of Habeas Corpus; Order to Show Cause; Return to Order to Show Cause; Order Dismissing Petition for Writ of Habeas Corpus and Denying Motion to Produce; Order re Custody; Notice of Appeal and Praecipe which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $7.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23 day of September, A. D. 1948.

(Seal) EDMUND L. SMITH
Clerk
By Theodore Hocke
Chief Deputy

[Endorsed]: No. 12048. United States Court of Appeals for the Ninth Circuit. John Rosselli, Appellant, vs. Robert E. Clark, United States Marshal for the Southern District of California, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 25, 1948.

PAUL P. O'BRIEN
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12048

UNITED STATES OF AMERICA, ex rel., JOHN ROSSELLI,

Petitioner,

vs.

ROBERT E. CLARK, United States Marshal,

Respondent.

POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL.

1. That the Honorable Court erred in discharging the order to show cause why a writ of habeas corpus should not issue upon the grounds, among other grounds: (a) that the Answer of the Respondent was limited to the proposition that the Court was without jurisdiction to issue a writ of habeas corpus where the United States Parole Board had issued its warrant for the arrest of the Appellant wherein it was asserted that the member of the Board of Paroles signing said warrant had reliable information that the Appellant had violated the conditions and terms of his parole; (b) that the Court erred in discharging said order to show cause because said Court did have jurisdiction to issue a writ of harbeas corpus to determine the issue set forth in Appellant's Petition for Writ of Habeas Corpus; that the warrant of arrest under which he was being held in the custody of the United States Marshal was issued in violation of the statutes requiring that such warrants of arrest could only be issued upon reliable information of the violation of the terms and conditions of parole, and that said warrant of arrest was issued without any reliable information of a or any of the terms and conditions of violation.

2. The Honorable Trial Court erred in not holding that your Appellant, John Rosselli, is wrongfully held and illegally imprisoned, and in dismissing his Petition and remanding him into the custody of Robert E. Clark, United States Marshal, for detention upon a warrant of arrest issued by Fred Rogers, member of the United States Parole Board.

3. The Honorable Trial Court erred in dismissing the Petition for Writ of Habeas Corpus of Appellant and in remanding him into the custody of Robert E. Clark, United States Marshal, on the ground that said err being that: (a) The United States District Court had jurisdiction to issue the writ of habeas corpus herein; (b) That said writ of habeas corpus should have issued as prayed for upon the ground that the warrant of arrest under which Appellant was being detained was issued by the said Fred Rogers, member of the United States Parole Board, without compliance with the Statutes in such case made and provided for, and in the absence of any reliable information for the issuance thereof.

4. The Honorable Trial Court erred in refusing to issue the writ of habeas corpus as prayed for.

Designation of the Parts of the Record Necessary for the Consideration of Points on Appeal:

Print the entire transcript of record.

OTTO CHRISTENSEN and
FRANK DESIMONE
By Frank Desimone

Received copy of the within Points on Appeal this 22 day of September, 1948. James M. Carter, by Veloris Bonhus.

[Endorsed]: Filed Sep. 25, 1948. Paul P. O'Brien, Clerk.

No. 12050

United States
Court of Appeals
for the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC., a corporation,

Appellant,

vs.

H. H. PIERSON,

Appellee.

Transcript of Record

Appeal from the District Court of the United States for the Northern District of California, Southern Division

Typo Press, 398 Pacific, San Francisco 10-22-48—60

No. 12050

United States
Court of Appeals
for the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC.,
a corporation,

Appellant,

vs.

H. H. PIERSON,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 11

Appeal:

- Certificate of Clerk to Transcript of Record on 38
- Designation of Contents of Record on (DC) 36
- Notice of 34
- Order Extending Time for Filing Record and Docketing 35
- Statement of Points Upon Which Appellant Intends to Rely on (USCA)..... 222
- Stipulation and Order Amending Designation of Contents of Record on (DC)..... 37
- Stipulation Designating Portions of Record to be Included in Printed Record on (USCA) 227

Certificate of Clerk to Transcript of Record on Appeal 38

Complaint 2

Designation of Contents of Record on Appeal (DC) 36

- Stipulation and Order Amending..... 37

Designation of Record on Appeal, Stipulation re (USCA) 227

PAGE

Findings of Fact and Conclusions of Law:
Dated Feb. 6, 1948 17
Dated June 21, 1948 25

Judgment dated Feb. 13, 1948..... 22

Judgment, Final, Dated June 28, 1948..... 33

Motion for New Trial..... 23

Names and Addresses of Attorneys..... 1

Notice of Appeal 34

Order Extending Time for Filing Record and Docketing Appeal 35

Order for Judgment 16

Order for Removal 9

Order Granting Motion for New Trial and Directing Judgment 24

Petition for Removal to the United States District Court 6

Statement of Points Upon Which Appellant Intends to Rely (USCA) 222

Stipulation and Order Amending Designation of Contents of Record on Appeal (DC)..... 37

Stipulation Designating Portions of Record be Included in Printed Record on Appeal (USCA) 227

PAGE

Transcript of Proceedings 40

Exhibits for Defendant:

A—Cable dated July 8, 1946, addressed to Suewer and signed Garrett 147

B—Radiogram dated July 8, 1946, addressed to Garrett and signed Suewer..... 148

C—Cable dated July 11, 1946, addressed to Suewer and signed Gefrett..... 148

D—Resolution of Board of Directors July 11, 1946 148

Exhibits for Plaintiffs:

1—Payroll check No. 3766, dated July 15, 1946, The De La Rama S.S. Co., Inc., to H. H. Pierson 74

2—Letter, June 18, 1943, The De La Rama S.S. Co., Inc., to Treasury Dept. BIR... 110

3—Letter, Aug. 10, 1943, The De La Rama S.S. Co., Inc., to Treasury Dept., BIR.. 113

4—Letter, March 16, 1945, The De La Rama S.S. Co., Inc., to Treasury Dept., BIR... 118

5—Certificate of Resolutions, July 7, 1940.. 128

PAGE

Witnesses for Defendants:

Middleton, Hugh

—direct 149
—cross 151

Pierson, H. H. (Deposition)

—direct 202

Suewer, Robert F. (Deposition)

—direct 157
—cross 175
—redirect 196, 197
—recross 196

Witnesses for Plaintiff:

McManus, James A.

—direct 101

Parkinson, Benjamin H.

—direct 88
—cross 97

Pierson, Herman H.

—direct 50
—cross 75
—recalled, direct 123, 139
—cross 125, 140

NAMES AND ADDRESSES OF ATTORNEYS

BROBECK, PHLEGER & HARRISON,

111 Sutter Street,
San Francisco, California.

Attorneys for Defendant and Appellant.

ROBERT C. PARTRIDGE,

1055 Mills Tower,
San Francisco, California.

Attorney for Plaintiff and Appellee.

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 360600

H. H. PIERSON,

Plaintiff,

vs.

DE LA RAMA STEAMSHIP CO., INC., a corporation, FIRST DOE, SECOND DOE, THIRD DOE,

Defendants.

COMPLAINT ON CONTRACT

Plaintiff complains of defendants, and for a cause of action alleges:

I.

That at all times mentioned herein, plaintiff was and is an alien corporation, organized and incorporated under the laws of the Philippine Republic, and engaged in a general maritime shipping business in the State of California and elsewhere, and having offices in the City and County of San Francisco, State of California.

II.

Thaat at all times mentioned herein, plaintiff was employed by the defendant, as its Pacific Coast Manager at its San Francisco office, under the terms of a verbal contract of employment, made and to be performed in the City and County [1*] of San Francisco, State of California, and that all

* Page numbering appearing at foot of page of original certified Transcript of Record.

the transactions related hereinafter occurred in the City and County of San Francisco, State of California.

III.

That during the month of February in the year 1944 the exact day of the month being not known to the plaintiff at this date, plaintiff stated as follows to Mr. R. F. Suewer, Vice President of the said defendant corporation, who at all times herein mentioned was acting as the agent and employee of said defendant corporation within the course and scope of his said employment: that the salary paid by defendant to plaintiff for his services performed, and to be performed, was insufficient and inadequate, and less than the reasonable value of his said services and less than salaries paid to other persons holding comparable positions and performing comparable duties in other similar steamship companies; that by reason of the insufficiency and inadequacy of said salary, he, plaintiff, was unable and unwilling to continue his employment with said defendant as its Pacific Coast Manager, and would therefore resign from said employment. At said time and place the said Mr. R. F. Suewer, acting for and on behalf of said defendant as hereinbefore set forth, verbally promised plaintiff and agreed with him that if he, plaintiff, would not resign his said position, and would continue in his said employment and in the performance of his duties as hereinbefore described, until the termination of actual combatant warfare of the United States, then in progress, defendant

would, within a reasonable time of the termination of such actual warfare, pay plaintiff a bonus, or sum of money, which together with the salary received by him from December 7, 1941 to the date of the termination of said actual combatant warfare would equal the salary and bonuses paid to [2] other persons holding comparable positions and performing comparable duties in similar steamship companies.

IV.

That plaintiff believed the promises and representations and agreements made by defendant, by and through its agent and employee, the said Mr. R. F. Suewer, and relied upon the same, and in reliance thereon, plaintiff did not resign his position with said defendant, and did continue in his position as Pacific Coast Manager for defendant, and performed his duties in conformance therewith, constantly and until August 31, 1946, which said date was after the date upon which actual warfare of the United States ceased.

V.

That during the period from December 7, 1941 to October 1, 1943, plaintiff was paid a salary by defendant at the rate of $600.00 per month; during the period from October 1, 1943 to August 14, 1943, plaintiff was paid a salary at the rate of $708.33 per month; that the total salary paid by defendant to plaintiff from December 7, 1941 to August 14, 1945 was the sum of $28,967.66; that during said period, persons holding comparable positions and performing comparable duties in

competing steamship companies were paid and received salaries at the rate of $1000.00 per month, or a total salary for said period from December 7, 1941 to August 14, 1945 of $44,226.12; that the difference between the amount actually paid to plaintiff by defendant, and the amount promised to him as hereinabove alleged, was and is the sum of $15,258.56, no part of which has been paid, save and except the sum of $2500.00. There is now due, owing and unpaid by defendant to plaintiff, the sum of $12,758.56 for which demand has been made by plaintiff upon defendant. [3]

VI.

That actual combatant warfare of the United States in World War II ended and ceased upon August 14, 1945; that a reasonable time has elapsed since said date to the date of this complaint for payment of said additional sums due plaintiff by defendant.

As and for a second cause of action plaintiff alleges:

I.

Plaintiff incorporates herein by reference, as though set forth in complete detail, the allegations contained in his first cause of action.

II.

That by reason of the matters herein alleged, defendant became indebted to plaintiff in the sum of $44,226.12, which sum is the reasonable value of plaintiff's services rendered to defendant for the period December 7, 1941 to August 14, 1945. That no part of said sum has been paid except the

sum of $31,467.66 although demand has been made therefor, and defendant fails and refuses to pay; and defendant corporation is indebted to plaintiff in the sum of $12,758.56 by reason thereof.

Wherefore, plaintiff prays judgment for the sum of $12,758.56, together with interest thereon as allowed by law and his costs of suit, and for such other and further relief as the court shall deem just and proper in the premises.

ROBERT G. PARTRIDGE,
LEO M. COOK,
Attorneys for Plaintiff. [4]

(Duly Verified.)

[Endorsed]: Filed Dec. 18, 1946. [5]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO THE UNITED STATES DISTRICT COURT

To the Honorable the Superior Court of the State of California in and for the City and County of San Francisco:

The petition of The De La Rama Steamship Co., Inc., a corporation sued herein as De La Rama Steamship Co., Inc., especially appearing for the sole and single purpose of presenting this petition, and for no other purpose, respectfully shows; your petitioner is one of the parties named as defendant in the above-entitled action, and is the sole and

only party named as defendant upon whom summons or process has been served. [6]

H. H. Pierson is the sole and only plaintiff herein. Said action has been commenced by the above-named plaintiff in the above-named Court by the filing of a complaint in said Court. On December 23, 1946 a summons was served on your petitioner in the City and County of San Francisco, State of California.

The time for your petitioner to answer or plead to the complaint in said action has not yet expired, and will not expire until the second day of January, 1947, and your petitioner has not yet filed any pleading, or in any way appeared in said action.

Said action is an action at law of a civil nature, and the matter in dispute in said action exceeds the sum of three thousand dollars ($3,000), exclusive of interest and costs.

Your petitioner was at the time of the commencement of the action, ever since has been, and still is a resident of and a citizen of the Republic of the Philippines, and a nonresident of, and not a citizen of the State of California. It is and was at all times herein-mentioned a corporation duly organized and existing under the laws of the Republic of the Philippines.

The plaintiff at the time of the commencement of this action was, ever since has been, and still is a resident and citizen of one of the states of the United States, to wit, the State of California, and is not, and at no time herein-mentioned has been a citizen or resident of the Republic of the Philippines.

Other than your petitioner, the only other defendants are certain alleged persons designated by the fictitious [7] names of First Doe, Second Doe, and Third Doe. The so-called defendants First Doe, Second Doe, and Third Doe which are fictitious designations are not actual parties but merely nominal or formal and nonexistent. No one has been served with process herein save your petitioner.

By reason of the facts stated there is diversity of citizenship between the plaintiff on the one hand and the sole party named as defendant and served with process on the other hand.

Your petitioner presents herewith a good and sufficient bond as required by the statute in such cases that it will enter in the United States District Court for the Northern District of California, Southern Division within thirty (30) days from the filing of this petition a certified copy of the record in this suit, and for the payment of all costs which may be awarded by said District Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner desires to remove said action to the United States District Court pursuant to the acts of Congress in such cases made and provided.

Wherefore, your petitioner, The De La Rama Steamship Co., Inc., a corporation, prays that this honorable Court proceed no further herein except to make an order of removal required by law and to accept the said bond, and to cause the record herein to be removed into the United States District Court for the Northern District of California,

Southern Division, and for such other relief [8] as may be meet and proper in the premises.

/s/ THE DE LA RAMA STEAMSHIP CO., INC.,

By /s/ ALAN B. ALDWELL,
Its Attorney.

/s/ BROBECK, PHLEGER & HARRISON,

/s/ HERMAN PHLEGER,

/s/ ALAN B. ALDWELL,
Attorneys for Defendant. [9]

(Duly Verified.)

(Receipt of Service.)

[Endorsed]: Filed Dec. 31, 1946. [10]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT

The De La Rama Steamship Co., Inc., a corporation, sued herein as De La Rama Steamship Co., Inc., a corporation, defendant in the above-entitled cause, having filed its petition in due form and within the time allowed by law for the removal of this cause to the United States District Court, for the Northern District of California, Southern Division, and having also filed its bond in the sum of Five Hundred Dollars ($500.00), conditioned as provided by law, with a good and sufficient surety, and it appearing to the court that the above-en-

titled action should be removed to the said District Court of the United States as prayed for [11] in said petition, and that the aforesaid bond is good and sufficient;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the above-entitled action be, and it is hereby removed to the said United States District Court for the Northern District of California, Southern Division; the Clerk of this court is directed to prepare and certify a transcript of record of said cause for filing in the said United States District Court upon payment to him of his proper fee therefor; that said bond is hereby approved, and that all further proceedings herein shall be and they are hereby stayed.

Done in open court this 2nd day of January, 1947.

HERBERT C. KAUFMAN.
Judge of the Superior Court.

[Endorsed]: Filed Jan. 2, 1947. [12]

In the United States District Court for the Northern District of California, Southern Division

No. 26761-G

H. H. PIERSON,

Plaintiff,

vs.

DE LA RAMA STEAMSHIP CO., INC., a corporation, FIRST DOE, SECOND DOE, THIRD DOE,

Defendants.

ANSWER OF DEFENDANT THE DE LA RAMA STEAMSHIP CO., INC.

Defendant The De La Rama Steamship Co., Inc., a corporation, sued herein as De La Rama Steamship Co., Inc., answers plaintiff's complaint as follows:

Answering the first alleged cause of action:

I.

Admits the allegations contained in paragraph I.

II.

Answering the allegations contained in paragraph II, this defendant admits that plaintiff was employed by it as its Pacific Coast Manager at its San Francisco office under the terms of a verbal contract of employment; except as herein expressly admitted, this defendant denies [13] each and every, all and singular, the allegations contained in said paragraph II.

III.

Denies each and every, all and singular, the allegations contained in paragraph III, except that this defendant admits that Mr. R. F. Suewer is and at all of the times mentioned in the complaint was a Vice-President and an agent and employee of this defendant, and in particular denies that he would be acting within the course and/or scope of his employment in making any such alleged contract as is alleged in said paragraph.

IV.

Answering the allegations contained in paragraph IV, this defendant admits that plaintiff was its Pacific Coast Manager until August 31, 1946, which said date was after the date upon which actual warfare of the United States ceased; except as herein expressly admitted, denies each and every, all and singular, the allegations contained in said paragraph IV.

V.

Answering the allegations contained in paragraph V, admits that during the period from December 7, 1941 to October 1, 1943, plaintiff was paid a salary by this defendant at the rate of $600 per month; admits that during the period from October 1, 1943 to August 14, 1945, plaintiff was paid a salary at the rate of $708.33 per month; admits that the total salary paid by this defendant to plaintiff from December 7, 1941 to August 14, 1945, was the sum of $28,967.66; admits that it paid to plaintiff the sum of $2500 on July 15, 1946, and alleges that said payment was offered to plaintiff

by this defendant in [14] full settlement of any and all claims which plaintiff might have against this defendant for a bonus and/or other compensation and accepted by plaintiff with full knowledge of such condition; admits that plaintiff has made demand upon this defendant for payment of the sum of $12,758.56; except as herein expressly admitted, denies each and every, all and singular, the allegations contained in said paragraph V and particularly denies that there is any sum due, owing or payable to plaintiff by this defendant either as alleged in said complaint or otherwise or at all.

VI.

Admits that actual combat warfare against the United States in World War II ended and ceased on or about August 14, 1945; admits that a reasonable time has elapsed since said date to the date of the complaint herein for the payment of any additional sums which might be due plaintiff by this defendant, if any such payment were due, but denies that any such payment ever was or is now due and/or payable.

As and for a second, separate and affirmative defense to said first alleged cause of action, this defendant alleges as follows:

I.

After the said alleged cause of action, if any, arose and on or about the 15th day of July, 1946, this defendant, while denying any liability for the payment of any bonus and/or other compensation, either as alleged in the complaint or otherwise,

offered to plaintiff the sum of $2500 on condition that it was in full payment of [15] any and all claim or claims which plaintiff might have against this defendant for any bonus and/or other compensation to be paid to him at the conclusion of World War II or otherwise; said payment was accepted by plaintiff with full knowledge of the said condition under which it was offered, and as a result there was a full accord and satisfaction of the claim stated in the complaint and any and all liability on the part of this defendant for the payment of any bonus or other compensation was fully and completely discharged.

As and for a third, separate and affirmative defense to said first alleged cause of action, this defendant alleges as follows:

I.

At all of the times mentioned in the complaint this defendant was and now is the employer of more than eight employees in a single business and as such was subject to and obliged to comply with all of the provisions of the Act of Congress known as the Stabilization Act of 1942 (50 U.S.C. App. Secs. 961 et seq.) and the regulations lawfully promulgated thereunder by the Economic Stabilization Director and the Commissioner of Internal Revenue of the Treasury Department of the United States which said regulations, among other things, required the approval of the Commissioner of Internal Revenue for any increase in the salary of any employee whose salary was in excess of $5000 per year; the payment or receipt of any salary to

or by such an employee in contravention of said regulations was illegal and punishable as a crime under said Act and any agreement for the increase or for [16] payment of an increase in salary whether at that time or at any time in the future without such approval was therefore contrary to public policy, illegal, unenforceable and void; all of said provisions were in full force and effect in the month of February, 1944, when the agreement for payment of bonus and/or other compensation as alleged in the complaint allegedly took place, and accordingly if any such agreement was made, it is illegal and void.

Answering the second alleged cause of action:

I.

This defendant refers to and by this reference incorporates herein all of the allegations contained in its first defense to plaintiff's first alleged cause of action as though set forth here in detail.

II.

Denies each and every, all and singular, the allegations contained in paragraph II, except that this defendant admits that the sum of $31,467.66 has been paid and that demand has been made for the payment of $12,758.56, and that this defendant refuses to pay said sum or any part thereof.

As and for a second, separate and affirmative defense to said second alleged cause of action, this defendant alleges as follows:

I.

This defendant refers to and by this reference incorporates herein its second defense to plaintiff's

first alleged cause of action as though said defense were set forth here in detail. [17]

As and for a third, separate and affirmative defense to said second alleged cause of action, this defendant alleges as follows:

I.

This defendant refers to and by this reference incorporates herein its third defense to plaintiff's first alleged cause of action as though said defense were set forth here in detail.

Wherefore, this defendant prays that plaintiff take nothing by his complaint herein, and that it be hence dismissed with its costs of suit.

/s/ BROBECK, PHLEGER & HARRISON,
/s/ HERMAN PHLEGER,
/s/ ALAN B. ALDWELL,
Attorneys for defendant The De La Rama Steamship Co., Inc. [18]

(Duly Verified.)

(Receipt of Service.)

[Endorsed]: Filed Feb. 25, 1947. [19]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

While I am convinced by the evidence that the plaintiff has been unfairly treated by the defendant through its general manager, there is not in the record any evidence of contractual liability up-

on the part of the defendant. Consequently it is my duty to render judgment for defendant and such will be the order.

Dated December 18, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Dec. 19, 1947. [20]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on November 6 and 10, 1947, before the Honorable Louis E. Goodman, United States District Judge, upon the issues raised by the complaint and the answer of defendant The De La Rama Steamship Co., Inc. Robert G. Partridge, Esq. appeared for plaintiff and Messrs. Brobeck, Phleger and Harrison, by Alan B. Aldwell, Esq., appeared for said defendant, and evidence, both oral and documentary, was received by the Court and the matter was argued by counsel and thereafter upon submission of briefs by respective counsel, the matter was, on December 1, 1947, submitted [21] for decision. After consideration of the evidence and stipulations of counsel, and the law and briefs and arguments of counsel, and having been fully advised in the premises, the Court announced its decision for said defendant and now makes its findings of fact and conclusions of law:

FINDINGS OF FACT

1. At all pertinent times plaintiff was and is a citizen of the United States and a resident of the Northern District of California, Southern Division.

2. At all pertinent times defendant The De La Rama Steamship Co., Inc., sued herein as De La Rama Steamship Co., Inc., was and is an alien corporation organized and incorporated under the laws of the Republic of the Philippines and engaged in a general maritime shipping business and having offices in the City and County of San Francisco, State of California, and within the Northern District of California, Southern Division. The other defendants mentioned in the complaint are fictitious defendants and have not been served with any process herein. As hereinafter used, the term "defendant" refers solely to defendant The De La Rama Steamship Co., Inc.

3. The allegations contained in paragraph II of the first cause of action of the complaint are true.

4. R. F. Suewer is, and since February 23. 1946, has been, a Vice President of the defendant, and at all pertinent times was and is United States manager of defendant; during the month of February, 1944, plaintiff and the said Suewer engaged in a conversation in the course of which the said Suewer stated that when the then existing [22] war was over, he would recommend to the Board of Directors of defendant in the Philippines that a bonus be paid to the key men in the United States

equal to the reasonable value of the services performed by them; [L.E.G.-D.J.]

organization of defendant; ^v the said Suewer, at the conclusion of the war, made a recommendation

to the Board of Directors of defendant, as a result of which plaintiff received a bonus of $2500.00; except as herein stated, the allegations contained in paragraph III of the first cause of action of said complaint are untrue.

5. It is true that plaintiff continued in his position as Pacific Coast manager for defendant until

in reliance upon the statements of Suewer above referred to [L.E.G.-D.J.]

August 31, 1946, which said date was after the date upon which actual warfare of the United States ceased, but except as herein stated, the allegations contained in paragraph IV of the first cause of action of said complaint are untrue.

6. During the period from December 7, 1941 to April 8, 1943, plaintiff was paid a salary by defendant at the rate of $600.00 per month plus a bonus at the end of each year of $600.00, or a total for said period of $10,220.00; during the period April 9, 1943 to March 16, 1945, plaintiff was paid a salary by defendant at the rate of $708.33 per month, plus a bonus at the end of each year of $708.33, or a total sum for said period of $17,873.56; during the period from March 17, 1945 to August 14, 1945, plaintiff was paid a salary by defendant at the rate of $750.00 per month, which, together with a prorating of his bonus for the year 1945, gave him a total remuneration for said period of $3,981.25; for the entire period from December 7, 1941 to August 14, 1945, and [23] including the $2,500.00 bonus above referred to, plaintiff received from defendant a total remuneration of

$34,574.81; if plaintiff had been receiving a salary which would have been reasonable compensation
[L.E.G.-D.J.]
of $1,000.00 per month during said period, ^v he would have received the sum of $44,250.00; except as herein stated, the allegations contained in paragraph V of the first cause of action of said complaint are untrue.

7. Actual warfare of the United States in World War II ended and ceased August 14, 1945.

8. The allegations contained in paragraph II of plaintiff's second cause of action are untrue, except for the allegation that defendant fails and refuses to pay to plaintiff the sum demanded by him or any part thereof.

9. At all pertinent times, the defendant was and is the employer of more than eight employees in a single business within the United States.

10. No approval was ever sought for or obtained from the Salary Stabilization Unit of the Treasury Department for the payment of any bonus by defendant to plaintiff.

11. At the trial of this action, the defendant withdrew its second defense contained in its answer to each of the causes of action alleged in the complaint.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court concludes:

1. The necessary diversity of citizenship between plaintiff and defendant and amount in controversy

exist so as to bring the action within the jurisdiction of this Court. [24]

2. There was and is no contractual liability on the part of defendant to pay plaintiff the amount demanded by him, or any part thereof, either as alleged in the complaint or otherwise or at all.

3. By reason of the preceding conclusion of law, this Court has come to no conclusion concerning the affirmative defenses of illegality pleaded in defendant's answer.

4. Defendant is entitled to a judgment in its favor dismissing the action and awarding to it its costs.

Let judgment be entered accordingly.

Dated at San Francisco, California, February 6th, 1948.

/s/ LOUIS E. GOODMAN,
United States District Judge.

(Receipt of Service.)

[Endorsed]: Filed Feb. 6, 1948. [25]

In the United States District Court for the Northern District of California, Southern Division

No. 26761-G

H. H. PIERSON,

Plaintiff,

vs.

DE LA RAMA STEAMSHIP CO., INC., a corporation, FIRST DOE, SECOND DOE, THIRD DOE,

Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on November 6 and 10, 1947, upon the issues raised by the complaint and the answer, both parties appearing by counsel, and thereupon evidence, both oral and documentary, was received by the Court and the matter was argued by counsel, and thereafter upon submission of briefs and consideration of the evidence and stipulations of counsel, and having been fully advised in the premises, the Court announced its decision for the defendant, and thereafter the Court duly made and filed its findings of fact and conclusions of law, whereby it was directed that [26] judgment be entered for the defendant.

It Is Therefore Hereby Ordered, Adjudged and Decreed that plaintiff take nothing in this action and that the action be and it is hereby dismissed on the merits, that defendant have and recover

from plaintiff its costs amounting to $94.20, and that defendant have execution therefor.

Dated February 13th, 1948.

LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as provided in Rule 5(d).

ROBERT G. PARTRIDGE,
Attorney for Plaintiff.

Entered in Civil Docket Feb. 14, 1948.

[Endorsed]: Filed Feb. 13, 1948. [27]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To the Defendant, De La Rama Steamship Co., Inc., a corporation, and to Messrs. Brobeck, Phleger & Harrison and Alan B. Aldwell, its attorneys:

You and each of you will please take notice that the plaintiff H. H. Pierson, above named, intends to and does hereby move the above entitled court to vacate and set aside the findings of the court and judgment entered thereon in the above entitled action, and to direct the entry of judgment, and to render judgment in favor of plaintiff and against defendant De La Rama Steamship Co., Inc., or to grant a new trial of said cause upon the following grounds:

1. The evidence in said cause justifies and re-

quires a judgment in favor of the plaintiff and against said defendant.

2. Insufficiency of the evidence to justify the decision and judgment, as the same are contrary to the evidence and to the [28] law applicable to the facts of the case.

3. Errors in law occurring at the trial and excepted to by plaintiff.

Said motion will be made and based upon the transcript, records, files and minutes of the above court.

ROBERT G. PARTRIDGE,
Attorney for Plaintiff.

Dated February 20, 1948.

(Receipt of Service.)

[Endorsed]: Filed Feb. 21, 1948. [29]

[Title of District Court and Cause.]

ORDER GRANTING MOTION FOR NEW TRIAL AND DIRECTING JUDGMENT FOR PLAINTIFF

Upon reconsideration of this cause and after argument and further briefing by counsel, I am convinced that plaintiff should prevail. My original holding that the record does not disclose "any evidence of contractual liability upon the part of defendant" now appears to me to have been erroneous.

The record does disclose that the defendant's United States Manager had the authority generally

to hire and discharge employees. The legal effect of the understanding between plaintiff and defendant's United States Manager was [30] that plaintiff would continue in defendant's employ at a salary or compensation to be later fixed. This was tantamount to a hiring at an undetermined salary equivalent at least to the reasonable value of plaintiff's services. § 1611 California Civil Code.

A finding to this effect should be included in the findings of fact.

The judgment heretofore entered is set aside and judgment may be entered in favor of plaintiff for the sum of $9650.00. Submit findings and judgment accordingly.

Dated June 9, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed June 9, 1948. [31]

[Title of District Court and Cause.]

PLAINTIFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on November 6 and 10, 1947, before the Honorable Louis E. Goodman, United States District Judge, upon the issues raised by the complaint and the answer of defendant The De La Rama Steamship Co., Inc. Robert G. Partridge, Esq. appeared for plaintiff and Messrs. Brobeck, Phleger & Harrison, by Alan B. Aldwell, Esq., appeared

for said defendant, and evidence, both oral and documentary, was received by the court and the matter was argued by counsel and thereafter upon submission of briefs by respective counsel, the matter was on December 1, 1947, submitted for decision. After consideration of the evidence and stipulation of counsel and the law and briefs and arguments of counsel, the court announced its decision for the defendant and thereafter executed, signed and filed findings of fact and conclusions of [32] law wherein judgment was ordered entered for defendant.

Thereafter and in the manner prescribed by law, plaintiff duly filed and served his motion for new trial, and thereafter and on the 3rd day of May, 1948 said motion came on for hearing before the court, whereupon said motion was argued on behalf of plaintiff by the said Robert G. Partridge, Esq., and on behalf of defendant by the said Alan B. Aldwell, Esq. The court thereupon requested that the said respective parties prepare and file with the court memoranda of law regarding grounds for such motion and the sufficiency thereof. Thereafter, upon submission of briefs by respective counsel the matter was submitted for decision on the ... day of June, 1948.

The court having been fully advised and having reconsidered the evidence and the law, briefs and arguments of counsel, and being of the opinion that the evidence in the case justifies and requires a judgment in favor of plaintiff and against the defendant; that the evidence in said cause is in-

sufficient to justify the decision and judgment heretofore made and entered as the same were contrary to the evidence and to the law applicable to the facts of the case, thereby duly made and entered its order that the judgment heretofore rendered in the above entitled case be opened, vacated and set aside; that amended findings of fact and conclusions of law be adopted, and that judgment be entered in favor of the plaintiff and against the defendant in the sum of $9,650.00, ~~plus interest on said sum,~~ [L.E.G.-D.J.] together with plaintiff's costs of suit.

The court now makes its findings of fact and conclusions of law:

FINDINGS OF FACT

1. At all pertinent times plaintiff was and is a citizen of the United States and a resident of the Northern District of California, Southern Division. [33]

2. At all pertinent times defendant The De La Rama Steamship Co., Inc., sued herein as De La Rama Steamship Co., Inc., was and is an alien corporation organized and incorporated under the laws of the Republic of the Philippines and engaged in a general maritime shipping business and having offices in the City and County of San Francisco, State of California, and within the Northern District of California, Southern Division. The other defendants mentioned in the complaint are fictitious defendants and have not been served with any process herein. As hereinafter used, the term "defendant" refers solely to defendant The De La Rama Steamship Co., Inc.

3. The allegations contained in paragraph II of the first cause of action of the complaint are true.

4. R. F. Suewer now is and at all of the times herein mentioned has been the United States General Manager of the defendant corporation and at all of said times was acting within the course and scope of his authority as such manager of said defendant corporation. At all of the times herein mentioned said R. F. Suewer as United States Manager for said defendant had authority to hire and discharge employees, including the plaintiff. During the month of February, 1944, plaintiff and said Suewer engaged in conversations in the course of which the said Suewer represented, stated and promised to plaintiff ~~on behalf of defendant corpo~~ration that if he, the plaintiff, would continue in the defendant's employ until the termination of the then existing war, said defendant corporation would, within a reasonable time after the then existing war was over, pay to plaintiff a sum of money, which together with the salary and bonuses received by plaintiff from defendant during the continuation of said war, would equal the reasonable value of the services performed by plaintiff for defendant corporation during the period of warfare. The said Suewer at said time represented, ~~stated and [34] promised to the said plaintiff~~ [L.E.G.-D.J.] that at the conclusion of the war the said Suewer would recommend to the Board of Directors that such additional sum of money or bonus be paid to plaintiff by defendant, which together with the salary and bonuses received by plaintiff during the war would equal the reasonable

value of the services performed by plaintiff for defendant during the period of warfare.

5. It is true that in the course of the conversations referred to, defendant corporation entered into an agreement with plaintiff in February of 1944, whereby plaintiff was hired by defendant from said time to the termination of the war, and that under and by virtue of the terms of the agreement of hiring, the total salary or compensation to be paid by defendant to plaintiff for his services from December 7, 1941 to August 14, 1945, the period during which actual warfare continued, was the reasonable value of plaintiff's services during such war period. Such additional compensation, salary or bonus, as together with the salary and bonuses received by plaintiff during the war would equal the reasonable value of the services performed by plaintiff for defendant during the period of warfare was payable by defendant to plaintiff within a reasonable time after the termination of the war.

6. Plaintiff continued in his position as Pacific Coast Manager for defendant until after August 14, 1945, believing and relying upon the promises, representations and statements made to him by defendant corporation through the said Suewer, and pursuant to the contract of hiring entered into as hereinbefore found, and defendant accepted and retained the benefit of the services of said plaintiff rendered on its behalf.

7. The reasonable value of the services performed by plaintiff for defendant during the period December 7, 1941 to August 14, 1945, which

period the court finds to be the period [35] of the existence of the warfare referred to, was and is the sum of $44,250.00, no part of which has been paid by defendant to plaintiff, save and except the sum of $34,600.00; there is now due, owing and unpaid by defendant to plaintiff as and for the balance due him for the reasonable value of his services during said period, the sum of $9,650.00.

8. At the conclusion of the said warfare the said Suewer made a recommendation to the Board of Directors of defendant that plaintiff be paid the sum of $2,500.00, and he was paid said sum by defendant, on the 15th day of July, 1946, which the court finds to be a reasonable time after the termination of said warfare to pay the additional compensation and wages due plaintiff by defendant. Said sum, together with the salary and bonuses he had received during the period of warfare referred to was less than the reasonable value of plaintiff's services for defendant during said period; the said Suewer did not recommend to the Board of Directors of said defendant that a bonus be paid by defendant to plaintiff which, together with the bonus, compensation and salary received by plaintiff from defendant during the period of actual warfare referred to would equal the reasonable value of the services rendered by plaintiff to the defendant.

9. Defendant became indebted to plaintiff in the sum of $9,650.00, no part of said sum has been paid, although demand has been made therefor, and a reasonable time to pay plaintiff after the cessation of actual warfare in World War II had

elapsed upon the date of the filing of the complaint herein.

10. At all pertinent times, the defendant was and is the employer of more than eight employees in a single business within the United States.

11. No approval was ever sought for or obtained from the Salary Stabilization Unit of the Treasury Department for the [36] payment of any bonus or additional compensation by defendant to plaintiff, and none was necessary or required for the payment of the additional compensation due plaintiff as herein found. The additional compensation promised and agreed to be paid to plaintiff by defendant was payable under the terms of said contract of hiring only after and upon the termination of wage and salary controls during the period of warfare, as established and prescribed by the Act of Congress known as the Stabilization Act of 1942 (50 U.S.C. App. Sec. 961-7) and the regulations lawfully promulgated thereunder by the Economic Stabilization Director and the Commissioner of Internal Revenue of the Treasury Department of the United States, and said Act and the regulations thereunder did not and do not prohibit the payment of said additional compensation to plaintiff.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the court concludes:

1. The necessary diversity of citizenship between plaintiff and defendant and amount in controversy exist so as to bring the action within the jurisdiction of this court.

2. The judgment heretofore made and entered in favor of the defendant and against the plaintiff is against and contrary to the law and the evidence in said cause, and that said judgment heretofore rendered in favor of the defendant and against the plaintiff is hereby opened, vacated and set aside.

3. Defendant is indebted to plaintiff for the reasonable value of services rendered upon a contract of hiring in the sum of $9,650.00, ~~with interest thereon at the rate of 7% per annum, from and after July 15, 1946.~~ [L.E.G.-D.J.]

4. Plaintiff is entitled to judgment against defendant in the sum of $9,650.00, ~~plus interest thereon at the rate of [37] 7% per annum from and after July 15, 1946, to and including the . . . day of ....., 1948, upon which date this judgment is made and entered, amounting to the sum of $.....,~~ [L.E.G.-D.J.] and to his costs of suit as herein incurred.

Let judgment be entered accordingly.

Dated San Francisco, California, June 21, 1948.

LOUIS E. GOODMAN,
United States District Judge.

Entered in Civil Docket, June 23, 1948. C. W. Calbreath.

Not approved as to form as provided in Rule 5(d): See letter dated June 18, 1948.

BROBECK, PHLEGER & HARRISON,
Attorneys for Defendant.

(Receipt of Service.)

[Endorsed]: Filed June 21, 1948. [38]

In the United States District Court for the Northern District of California, Southern Division

No. 26761-G

H. H. PIERSON,

Plaintiff,

vs.

DE LA RAMA STEAMSHIP CO., INC., a corporation, FIRST DOE, SECOND DOE, THIRD DOE,

Defendants.

JUDGEMENT

The above entitled caause came on regularly for trial on November 6 and 10, 1947, upon the issues raised by the complaint and the answer, both parties appearing by counsel, and thereupon evidence, both oral and documentary, was received by the Court and the matter was argued by counsel, and thereafter upon submission of briefs and consideration of the evidence and stipulations of counsel, and having been fully advised in the premises, the Court announced its decision for the plaintiff, and thereafter the Court duly made and filed its findings of fact and conclusions of law, whereby it was directed that judgment be entered for the plaintiff and against the defendant in the sum of $9,650.00, plus costs of suit incurred. [39]

It Is Therefore Ordered, Adjudged and Decreed that plaintiff have and recover from defendant, The De La Rama Steamship Co., Inc., a corpora-

tion, the sum of $9,650.00, together with his costs of suit incurred, amounting to $26.90, and that upon the expiration of ten (10) days from the date of entry of this judgment execution may issue.

Dated June 28, 1948.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Entered in Civil Docket, June 29, 1948.

Approved as to form as provided in Rule 5(d):

/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Defendant.

Entered Volume 5, page 99.

[Endorsed]: Filed June 28, 1948. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that defendant The De La Rama Steamship Co., Inc., sued herein as De La Rama Steamship Co., Inc., hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the "Order Granting Motion for New Trial and Directing Judgment for Plaintiff" made and

entered in this action on June 9, 1948 and from the final judgment entered on June 28, 1948, and from each of them severally.

Dated July 8, 1948.

BROBECK, PHLEGER & HARRISON,

Attorneys for Appellant The De La Rama Steamship Co., Inc.

(Receipt of Service.)

[Endorsed]: Filed July 8, 1948. [41]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

It appearing to the Court that notice of appeal herein was filed by appellant on July 8, 1948, and that the Designation of Contents of Record on Appeal was filed on July 9, 1948, and that the reporter will be unable to prepare the transcript of the evidence within the forty-day period prescribed by Rule 73(g) of the Federal Rules of Civil Procedure;

Now, on motion of Messrs. Brobeck, Phleger & Harrison, attorneys for appellant, it is hereby ordered that the time within which the Record on

Appeal shall be [42] filed and the appeal docketed, be and it is hereby extended to and including September 30, 1948.

Dated August 16, 1948.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Aug. 16, 1948. [43]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant designates the following portions of the record to be contained in the record on appeal in the above-entitled action:

1. Complaint;
2. Petition for Removal to the District Court of the United States;
3. Order for Removal;
4. Answer;
5. Transcript of the entire evidence;
6. Deposition of H. H. Pierson;
7. Deposition of R. F. Suewer; [44]
8. All Exhibits introduced at the trial;
9. Order for Judgment dated December 18, 1947 and filed December 19, 1947.
10. Findings of Fact and Conclusions of Law dated and filed February 6, 1948;
11. Judgment entered February 14, 1948;
12. Plaintiff's Motion for New Trial;

13. Order Granting Motion for New Trial and Directing Judgment for Plaintiff, dated and filed June 9, 1948;

14. Findings of Fact and Conclusions of Law dated and filed June 21, 1948;

15. Judgment entered June 28, 1948;

16. Notice of Appeal;

17. This Designation.

Dated July 9, 1948.

BROBECK, PHLEGER & HARRISON,

Attorneys for Appellant The De La Rama Steamship Co., Inc.

(Receipt of Service.)

[Endorsed]: Filed July 9, 1948. [45]

[Title of District Court and Cause.]

STIPULATION AND ORDER AMENDING DESIGNATION OF CONTENTS OF RECORD ON APPEAL

It Is Hereby stipulated by and between the parties hereto that the designation of contents of record on appeal heretofore filed on July 9, 1948 is hereby amended so that the record on appeal shall also include the following documents:

Order extending time for filing record on [46] appeal and docketing appeal dated Aug. 16, 1948;

This stipulation and order.

Dated September 16, 1948.

/s/ ROBERT G. PARTRIDGE,
Attorney for Plaintiff.

/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Appellant The De La Rama Steamship Co., Inc.

So Ordered this 16th day of September, 1948.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 16, 1948. [47]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 47 pages, numbered from 1 to 47, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of H. H. Pierson, Plaintiff vs. De La Rama Steamship Co., Inc., a corporation, et al, Defendants, No. 26761-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and

certifying the foregoing transcript of record on appeal is the sum of three dollars and twenty cents ($3.20) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 28th day of September, A. D. 1948.

(Seal) C. W. CALBREATH,
Clerk. [48]

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. Louis E. Goodman, Judge.

No. 26,761-G

H. H. PIERSON,

Plaintiff,

vs.

DE LA RAMA STEAMSHIP CO., INC., a corporation, FIRST DOE, SECOND DOE, THIRD DOE,

Defendants.

REPORTER'S TRANSCRIPT

Thursday, November 6, 1947

Appearances: For Plaintiff: Robert G. Partridge, Esq. For Defendants: Messrs, Brobeck, Phleger & Harrison, By Alan B. Aldwell, Esq. [1*]

The Clerk: Pierson vs. De La Rama Steamship Co., for trial.

Mr. Partridge: The plaintiff is ready.

Mr. Aldwell: The defendant is ready.

Mr. Partridge: I wonder if I may briefly address your Honor on the issues of the case with respect to the plaintiff?

The Court: I have read the pleadings, if that would be of any help to you.

Mr. Partridge: Very well.

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* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Court: The pleadings present a very simple issue as to whether or not this agreement was made.

Mr. Partridge: With your Honor's indulgence I believe it might be helpful if I could enlarge on the picture presented by the pleadings. I will try to make it brief. As your Honor knows, the pleadings allege a contract made between the plaintiff and the defendant with respect to the wages or compensation to be paid Mr. Pierson for his services as Pacific Coast Manager of the defendant steamship line during the war period. The evidence will show that prior to the war, and in January, 1940, the defendant became employed by the De La Rama Steamship Company, a Philippine corporation, in the same capacity that he occupied during the time in issue or in question, and that his duties before the war might generally be described to include the management of the affairs of the company on thist coast, both in San Francisco [2] and in Los Angeles, bearing in mind that at that time the company was the owner of about seven vessels, if my memory serves me correctly, all of which, of course, were in and out of this port, not domiciled or based here, but touching here as a port of call regularly.

The outbreak of the war found the company with far fewer total vessels of its own, and there ensued after the outbreak of war a lull or a period of uncertainty while the company was attempting to get agency contracts from the War Shipping Administration, first the Maritime Commission, and then that was succeeded by the War Shipping Ad-

ministration. They were successful in doing that, Mr. Pierson all the while remaining with the company, and as a result its operations changed from one in which a couple of ships a month was an average in and out of the port, to from five to ten ships in and out of the ports under the jurisdiction of Mr. Pierson.

In addition, delivery was taken over some 20 or 21 vessels made in the various local bay shipyards. That entailed, of course, a thorough inspection of the vessel, the acceptance of it, the manning of it, supplying officers and crew, provisioning it, fueling it, and finally delivering it appropriately to the docks in San Francisco or Los Angeles for loading. All their work during the war, as your Honor undoubtedly knows, was for the account of the Navy [3] and the Army, or at least essentially all of it, shall I say, and 21 such ships were accepted by the company during this war period.

In addition to that, the company was the agent of other steamship lines based elsewhere—for example the State Steamship Lines, based at Vancouver, Washington, which company, in turn, was an agent of W. S. A., but as was common among steamship companies, appointed agents in places, including San Francisco, to handle its boats that it operated for W. S. A. So as a result the volume of shipping, the duties of Pierson and all of the managers of steamship lines increased many fold during this war period. It was a big job, a job that was very exacting, and a job that was very successfully, in the aggregate, conducted by the shipping interests.

Mr. Suewer, whose deposition has been taken in this matter, which will undoubtedly be read, or portions of it read as evidence in the case, was before the war and at the outbreak of the war entitled the United States Manager for the defendant steamship company, and your Honor will bear in mind that he was actually the only—I do not believe he was an officer, but the only representative of the De La Rama Steamship Company in the United States, at all, that is to say, all of the operations of this company, from the time of the outbreak of the war, were necessarily under the jurisdiction only of Mr. Suewer, that is to say, he entered [4] into agency contracts with the Government, with other steamship lines, he bought and sold vessels, he collected his commissions from the Government, he handled all the funds, he did everything simply because the home office of the corporation was completely out of touch with the United States after the outbreak of war sometime in December, 1941. He hired people. He raised their salaries. He fired them. He was the corporation in every sense of the word, and I am stressing that because I believe it will be important in view of the issues raised by the deposition and the pleadings.

Under him was a man named Griffin, who was entitled his assistant United States manager, and then Mr. Pierson was next.

At frequent intervals, and particularly in February, 1944, Mr. Pierson discussed with Mr. Suewer, he being the only one to discuss matters with, the

question of the wage scale of this steamship company as compared with other steamship companies in comparable operations on the coast, and he pointed out to Mr. Suewer that the scale was substantially less, and that a number of the key men, including he, Mr. Pierson, would leave to go to other steamship companies where they could make substantially more, unless some method was found to reimburse these key men, including Pierson, for these extraordinary wartime services. At that time, of course, the Stabilization Act was in effect, freezing salaries as of [5] October 3rd—I believe salaries as of October 27, 1942 and wages as of October 3, 1942. For that reason, and for other excuses, good or bad, given by Mr. Suewer, the only action that was taken with respect to Mr. Pierson's repeated demands was an application for two raises so far as Pierson was concerned. He was raised from $600 a month, his salary commencing with the outbreak of the war, to $708 in October, 1943, and to $750 in 1945. Mr. Suewer, in response to questions addressed to him by Mr. Pierson, said substantially, "I realize that we are below the scale or the average pay. I know that something will have to be done about it. If you men will play along with us, I will see that at the conclusion of the war the company will pay you such additional sum as, together with your wartime pay, will bring you up to the standard of comparable jobs on this coast, if you will play along with us and do not leave us in the lurch now," adding, too, that he was getting what he expressed as a niggardly re-

turn, but he was going to have to wait, and he was going to see that upon the conclusion of the war he was amply rewarded for his services.

After the war and after Mr. Pierson and his other assistants had done an excellent job, Mr. Suewer caused these bonuses to be paid. Suewer had been earning $1000 a month. He caused himself to be paid an additional $28,000 a year for some four years plus. He caused Mr. Griffin, who was [6] making some $850 a month, to be paid an additional total bonus I believe of $26,000. His view of what should be paid to Mr. Pierson in line or in view of the arrangements had between him, was that Pierson should receive merely the sum of $2500, which, peculiarly enough, was the same sum that was likewise received by two assistants of Mr. Pierson, Mr. McManus and Mr. Middleton, both of whom were supervised by Mr. Pierson. Mr. Pierson got merely the same amount.

When Mr. Pierson attempted to take Mr. Suewer to task regarding the situation, and to point out what he deemed to be the inequity of the situation, Mr. Suewer refused to discuss the matter with him at all. Now, we propose to show that comparable jobs held by other employees of steamship companies compared to this one paid a minimum of $12,000 a year, as alleged in the complaint, up to as high as $20,000; and that that was the reasonable value of his services, and that necessarily was implied in the agreement or the discussion had with Mr. Suewer. We propose to show Mr. Pierson had multifarious duties which he efficiently, capably

and consistently performed on behalf of the corporation, and if we show those things we ask a judgment at the hands of this court in such additional amount as the court finds is reasonable for the services performed.

The Court: I know it is in the answer, Mr. Partridge, that this payment of $2500 is claimed to have been an accord [7] and satisfaction. Is that a matter that will be in dispute between the parties?

Mr. Partridge: I had better ask Mr. Aldwell to answer, your Honor. We had some discussion on the subject recently.

Mr. Aldwell: We had some discussion on that, and we won't press that point, your Honor, because I have taken Mr. Pierson's deposition subsequent to filing the answer. I think it is fairly clear that he accepted the claim before he realized our position on that. So we won't press that particular point.

The Court: The issue will be squarely whether there was such an agreement?

Mr. Aldwell: It is a little more than that. Are you finished, Mr. Partridge?

Mr. Partridge: Yes.

Mr. Aldwell: If Mr. Partridge is finished I would like to be heard a minute to clarify the matter.

The Court: Yes.

Mr. Aldwell: Mr. Partridge's statement I think fairly accurately depicts the situation, except as to certain statements of fact which are in dispute.

Our position is, 1, Mr. Suewer had no authority to enter into any such agreements as are alleged in the complaint; but even if he did, any agreement that was made was purely one of grace, you might say, on the part of the corporation—in other words, that [8] Mr. Pierson did not have any binding contract, because it was entirely too indefinite. It was just that Mr. Suewer would see what he could do at the end of the war. He did. He went over there and discussed it with them, and he was given authority to set the bonuses for the so-called key men in the United States. He sent Mr. Pierson $2500. The money was paid to him. They do not dispute that. If there was a contract, it was performed.

Furthermore, we contend that if there was any such contract, binding contract, you might say, otherwise binding contract on the part of the defendant to pay Mr. Pierson a bonus such as he alleges, then it was illegal because of the provisions of the Wage Stabilization Act and the regulations of the Salary Stabilization Unit.

The Court: Even if it was not to be paid until after the war?

Mr. Aldwell: Even if it was not to paid until after the war.

The Court: In other words, that statute made agreements just as invalid as actual payments?

Mr. Aldwell: That is our contention, your Honor, yes, that there would be no question but what it could not have been paid at that time. It could not have been paid on August 14, 1945, when

the war ended—at least for purposes of this action it could not have been paid then, because the wage controls [9] were still on. They were not taken off until August 18th. They were changed so you could give salary increases as long as you did not want price relief, and, of course, they all came off in 1946. Our contention is the agreement being invalid from its inception, it could not become valid by reason of subsequent developments.

The Court: Wouldn't an agreement to pay an additional salary at a time when the payment of it would no longer be contrary to any statute, in itself be unlawful?

Mr. Aldwell: That is our contention. Otherwise, there would be no point to it. Everybody could have done the same thing. The whole idea of wage stabilization would have been out the window. It was an obvious subterfuge.

The Court: Of course, that is a point you would have to argue, whether the mere entering into of an agreement to pay at some time when it would be lawful to make the payment would of itself, have any impact on the anti-inflationary program for Congress. I suppose it would take an economist or someone else to answer that question.

Mr. Aldwell: I think apart from that, your Honor, assuming the agreement was for the payment of the bonus after they could get in touch with Manila, that did not necessarily contemplate that the wage controls or salary controls would be off, and any such agreement, if there was any, was not made with any regard to whether they would be on or off. [10]

The Court: There will be a dispute as to what the actual agreement was?

Mr. Aldwell: Very definitely.

The Court: Assuming the authority of the manager to make the agreement, there will be a dispute as to the precise terms of that agreement?

Mr. Aldwell: Yes, your Honor.

The Court: That it is a factual question.

Mr. Aldwell: Yes, your Honor.

The Court: Is that all?

Mr. Aldwell: Except as to the legality point.

Mr. Partridge: It is not the time to argue the case. Your Honor has preconceived our position in the matter. I think that we can show your Honor there is not one word in the Stabilization Act that deals with a contract as distinguished from payment or receiving wages or salary. Indeed, as a prerequisite to filing an application for increase under the so-called Form 10, it was required that it be recited that there was a binding contract entered into my the parties—for example, unions and the employers to pay the increased wages—needing only the approval of the War Labor Board or the Salary Stabilization Unit to put it in effect, and that will be our position in the matter. [11]

HERMAN H. PIERSON,

the plaintiff herein, was called as a witness on his own behalf, and being first duly sworn testified as follows:

The Clerk: Q. Will you state your name to the court?

A. Herman H. Pierson.

(Testimony of Herman H. Pierson.)

Direct Examination

Mr. Partridge: Q. Where do you live, Mr. Pierson? A. In Larkspur, Marin County.

Q. How old are you? A. 62.

Q. Are you married? A. Yes, sir.

Q. Do you have a family?

A. Three daughters.

Q. How long have you lived in this area?

A. Do you mean within San Francisco?

Q. In the bay area.

A. I have lived here all my life, with the exception of three years.

Q. What is your business or occupation?

A. Steamship business.

Q. How long have you been in that business?

A. I started out in '21 in the offshore business, and I had five years' experience on the San Francisco Bay in river boating. [12]

Q. Prior to 1921 you were in the bay and river boat business, were you? A. That is right.

Q. With what company did you start your offshore career? A. The Dollar Steamship Line.

Q. How long were you with that company?

A. Eight years.

Q. What were your duties, finally, as you left the company?

A. I was a district freight agent.

Q. Why did you leave, do you remember?

A. I had a better offer to go with Williams, Dimond & Company.

Q. Is that a steamship line?

(Testimony of Herman H. Pierson.)

A. A steamship agent.

Q. You left there after eight years, or in 1929, did you? A. That is right.

Q. How long were you with Williams, Dimond & Company? A. Ten years.

Q. What were your duties at the conclusion of your employment there?

A. I was traffic manager during that period.

Q. Was that for this area? A. Yes, sir.

Q. Then where did you do?

A. I opened a corporation in San Francisco, or at least in California, called the De La Rama Steamship Agencies. [13]

Q. What that a steamship company, as such, or a corporation to act as an agency for a steamship company?

A. A corporation to act as an agency of the steamship corporation.

Q. Were you one of the owners of that company? A. I was part owner, yes.

Q. Who else was in it with you?

A. Mr. Bradford.

Q. Did you, among others, act as steamship agent for the De La Rama Steamship Line here?

A. We were the agents for them in California.

Q. At some time or other you went with the De La Rama Steamship Company?

A. The De La Rama Steamship Company bought out the agency business and put in their own offices in San Francisco and Los Angeles.

Q. And were you taken along as part of the deal, so to speak? A. Yes, sir.

(Testimony of Herman H. Pierson.)

Q. Did you then go to work for the De La Rama Lines? A. Yes, sir.

Q. When was that? A. July 1, 1940.

Mr. Partridge: It may be stipulated, Counsel, that the De La Rama Steamship Company is a Philippine corporation?

Mr. Aldwell: Yes. [14]

Mr. Partridge: Organized under the laws of the Philippine Islands, and doing business, among other places, in the State of California, at all of the times under discussion here?

Mr. Aldwell: So stipulated.

Mr. Partridge: Q. When you first went to work for the company what was your title?

A. The De La Rama Steamship Company—I was the Pacific Coast Manager.

Q. How many offices, if they had more than one, did the company have on this coast?

A. They had one here in San Francisco, and one in Los Angeles, and they had an office down in Long Beach, which is the dock office, where we docked our vessels.

Q. What territory did your management embrace? A. It took in the whole Pacific Coast.

Q. What salary were you paid at that time?

A. $600.

Q. Per month? A. Yes, sir.

Q. Was there a bonus paid to you customarily during the years before the war?

A. A month's salary was paid to us at Christmas time.

Q. A month's salary?

(Testimony of Herman H. Pierson.)

A. A month's salary, yes, sir.

Q. Did you receive that all throughout your employment? [15] A. I did, yes.

Q. That is, before the war and during the war?

A. Correct.

Q. The business of the De La Rama Steamship Company can be generally described as what? What does it do?

A. You mean before the war?

Q. Well, yes, before the war.

A. Before the war they were operating steamers from the Philippine Islands and oriental ports to the Atlantic Coast, via the Pacific Coast, and also had a service from the Philippines and oriental ports to the Pacific Coast.

Q. Were those two services described within the company in any particular way?

A. The one to the Atlantic Coast was called the A Service, and the one to the Pacific Coast the B Service.

Q. How many ships touched your territory on an average per month under conditions obtaining before the war in both Services A and B?

A. On the A Service we would have, say, the vessels calling in to Los Angeles coming from the Orient, where they discharged a certain amount of cargo and fuel, and then on their return to the Orient they would stop in at Los Angeles and San Francisco for cargo going to the Orient, and we would have one of those vessels about once every 21 days.

(Testimony of Herman H. Pierson.)

Q. That is in the A Service? [16]

A. In the A Service.

Q. How many would you have, on an average, would you say, in the so-called B Service from the Philippines?

A. On the B Service they operated three vessels; that gave us about a vessel a month.

Q. How many people did you have under your jurisdiction in conditions before the war?

A. I would say I had about 12 to 15 in all the offices.

Q. Did that include a manager for the Los Angeles office? A. That is right.

Q. Who was that, do you remember?

A. Mr. Hugh Middleton.

Q. Was he with the company before the war?

A. Yes, sir.

Q. Did you hire him?

A. I hired him when I opened my corporation, and then he was taken over when the De La Rama Corporation bought out my agency corporation.

Q. What other managers or executives were with the company before the war in your territory?

A. They brought over a Mr. Bradford from Manila, who was put in the San Francisco office as the No. 2 man in the United States.

Q. Your superior, in other words?

A. That is right. [17]

Q. What was his title, Assistant United States Manager? A. Correct.

Q. And then was Mr. McManus with the company before the war?

(Testimony of Herman H. Pierson.)

A. Just shortly before the war. I think McManus came with us about in March or April, 1941.

Q. What title was he given?

A. At that time he was the assistant superintendent on our dock.

Q. Do you remember the outbreak of the war in December, 1941? A. I do.

Q. Will you tell the court whether or not your company, or at least you, on behalf of the company, were in communication with the Philippine Islands from and after any particular date that you recall?

A. The company—most of the communications from the company were from the New York office to Manila, and they had communications up until, I would say, December, 1941.

Q. Did you, for example, on behalf of the company, or otherwise, communicate at all with any official of the company in the Philippine Islands, say, after the end or the close of the year 1941?

A. No, sir, we did not.

Q. Until the war was over? A. No, sir.

Q. Or any of them communicate with you?

A. Not the officials in Manila.

Q. So far as you know, after the close of the year 1941 until the conclusion of the war, was there any officer or member of the board of directors of the defendant company in the United States at any time? A. Not to my knowledge.

Q. Did you have any written communication with any of them? A. No, sir.

(Testimony of Herman H. Pierson.)

Q. Who managed the affairs of the company in the United States during the war years?

A. Mr. Suewer.

Q. And what are his initials?

A. I think it is R. E.

Q. You call him Bob, do you not?

A. That is right.

Mr. Aldwell: We will stipulate his initials are R. F.

Mr. Partridge: Q. Was Mr. Suewer with the company when you first went with it in 1940?

A. 1940, yes, he was taken over at the same time; they bought out another corporation in New York that was their United States Agent, and he went over the same time I went over to the corporation.

Q. In what capacity?

A. As United States Manager.

Q. Prior to the war, was it your instruction and custom to [19] report to Mr. Suewer respecting problems in connection with your operations here?

A. That is right.

Q. Did you report to Manila or to Mr. Suewer?

A. Mr. Suewer.

Q. What he did from there on was his own problem, is that correct, with regard to communicating or authority from Manila?

A. Correct.

Q. And so far as your operations during the war, did they change any from your operations in peacetime; that is to say, when I say "you" I mean the company's operations?

(Testimony of Herman H. Pierson.)

A. You say change the operations during the war against the peacetime operations?

Q. Yes. What changes, if any, took place in connection with the operations?

A. After we got our contract with the Government, naturally the operations were much greater.

Q. Let us go a little more slowly on it. You owned a number of vessels, did you, the company did, during peacetime?

A. Yes, they had three of their own that they ran in connection with some other ships under charter.

Q. Is that the total number of ships that they owned?

A. That is the total number of ships they owned, that they ran offshore in that service I am talking about.

Q. In the services you are concerned with? [20]

A. Yes.

Q. How many ships did the company own that were located at the outbreak of the war in waters within your territory?

A. They owned three ships.

Q. They still own the three, do they? Did they lose any of those three during the war?

A. They lost one.

Q. Did that reduce the total number of ships owned by them to two, or did they acquire others?

A. No, they only had the two.

Q. Did your company secure this contract with the Government immediately upon the outbreak of the war, or was there some lapse of time?

(Testimony of Herman H. Pierson.)

A. I think there was a lapse of about nine to ten months until they finally made the contract with the Government. I think it was September, 1942 when they finally made the contract with the Government.

Q. When you say the contract with the Government, will you briefly describe what that arrangement was? I mean, was that made to operate Government ships? I am taking the liberty of transgressing on the rules of evidence, because I think we are all generally familiar with what happened during the war. Was that so-called contract with the Maritime Commission to operate ships on its behalf in Government service?

A. That is right. [21]

Q. Do you know who executed that contract for the company? A. Mr. Suewer.

Q. How many ships did you operate for the Government?

A. Before we made that contract?

Q. No, pursuant to the contract, after the contract.

A. I think we took delivery of 21 ships under that contract from the Government.

Q. When you say "we" will you describe who you mean?

A. When I say "we" I mean the company took over the agency of 21 vessels.

Q. Where? New Orleans, New York, or where?

A. They took over 20 of them, if I recall correctly, which were taken delivery of in San Fran-

(Testimony of Herman H. Pierson.)

cisco or Los Angeles, and one was taken delivery up in Maine.

Mr. Aldwell: Q. What was that last statement?

A. One was taken delivery of up in Maine.

Mr. Partridge: Q. Will you tell the court, without too much detail, but generally tell the court what taking delivery of a vessel entails, so far as your responsibility is concerned?

A. It is a matter of checking up with the shipyard to find out what the date of delivery would be, providing officers over there so many days before that date, and then on the date of taking delivery, checking up with the officers to see that the ship was in proper condition for delivery to be taken; then [22] supplying the crew to man the vessel, taking delivery of the ship from the shipyard, putting it down at a dock in San Francisco, arranging for storing fuel and putting the ship in proper condition for operation, and then arranging for berthing and for loading.

Q. Without any reflection intended on our shipbuilders, what, generally, did you find the condition of the ships to be? Did they require additional work by you?

A. There was hardly a ship we took delivery on, so far as I am concerned, on the Pacific Coast, that, after delivery was taken we didn't have to do additional things in the galley, in the engine room, or something of that kind.

Q. Were these procedures that you have described under your supervision and control, or not?

(Testimony of Herman H. Pierson.)

A. They were under my supervision entirely.

Q. Was that on all of the 20 ships?

A. Yes, sir.

Q. What did you do with a ship after it had been delivered, provisioned, stored and manned? What was its function and your function in connection with it?

A. We had to take it up with the War Shipping Administration to find out who was going to load the vessel, either the Army or the Navy, and then arrange with them for the docking or what facilities they were going to use for docking, and get the ship over to the dock so they could start loading cargo. [23]

Q. What correlation, if any, was necessary to be carried on in any way on behalf of your company and the Government, including the WSA and the Army and Navy?

A. You are in constant touch with them all the time, the WSA, who is naturally your boss; and then you are in close touch or daily touch, many times a day in fact, with the Army and Navy in the movement of your ships?

Q. Was all loading and unloading done on behalf of the Government during the war?

A. It was.

Q. They were your only customers, so to speak?

A. That is right.

Q. Who, particularly, at WSA did you have most of your contact with during the period of the war?

(Testimony of Herman H. Pierson.)

A. Contact regarding the operation of the ship was with Mr. Joe Blackett.

Q. What was his job over there, do you know?

A. I do not recall what his title was over there, but he was in the operating end of it.

Q. Having completed the duties in connection with the delivery of a ship and loading it, then generally what would you say your duties were with respect to that ship, or other ships coming into port or leaving port?

A. Well, you would always have to keep in touch with the Army or Navy on the arrival of ships coming back from the [24] war zone, or wherever they were discharged, and make arrangements for repairs and maintenance, drydocking or inspections, if necessary, and then remanning—in fact, you would have to pay off the old crew first and then re-man, and then supply to get the ship in position for loading again.

Q. Were those things done under your supervision and direction? A. They were, sir.

Q. Did you have an office located in both Los Angeles and San Francisco? A. We did.

Q. Manned by an office staff? A. Correct.

Q. Did that staff, by the way, increase over the 12 to 15 you mentioned before the war to a great number during the war?

A. I would say during the war, at the peak, we were between 30 and 35.

Q. Was the management of the respective offices a part of your responsibility?

A. It was.

(Testimony of Herman H. Pierson.)

Q. Did you have an accounting department to keep track of your income and your disbursements?

A. We did.

Q. Was that your responsibility, too, or not?

A. It was.

Q. Incidentally, did you deal in funds for the company during the war?

A. I signed all the checks—at least, I signed most of the checks. There were other signatures, but any amounts over $10,000 had to have my signature on.

Q. Did you have unlimited authority to sign checks? A. Yes, sir.

Q. That is, up to the bankroll of the company, I take it? A. That is right.

Q. Did you have a revolving fund at your disposal here?

A. We had a revolving fund of Government money in the amount of $350,000.

Q. Did you also have a fund of the company at your disposal?

A. We had a revolving fund that I think was $25,000.

Q. Was dispersal of items from those funds your responsibility or not? A. They were.

Q. Can you tell the court what average amounts of money you dealt with per month, both Government and the company?

A. It varied, depending upon the arrival of the steamers or the amount of bills we paid in the respective funds. In other words, on the Govern-

(Testimony of Herman H. Pierson.)

ment vessels it ran from, say, some months, $100,000 up to as high as $250,000.

Q. That was for labor, storing— [26]

A. Labor, paying provision bills, fuel bills, payroll on the ships, repair bills up to a certain amount.

Q. Was the dispersal of those funds your duty?

A. It was under my supervision.

Q. Did you hire and discharge employees, as occasion required? A. I did.

Q. Did you report that to Mr. Suewer?

A. If I fired somebody and hired a replacement, I just notified him of the change and sent the necessary bonding applications, which is the usual thing to do in those cases.

Q. In addition to the ships operated for the Government, were you supervising any other vessels calling in this port?

A. In addition to the owners of the steamers of the De La Rama Company, we were the agent, we had the agency in California of the States Steamship Company, and the Pacific-Atlantic Steamship Company, of Vancouver, Washington.

Q. Were they likewise agents for WSA under a contract similar to yours?

A. They had a similar contract with the WSA as we had.

Q. Did you service—

A. We serviced their ships whenever they were in California ports, which were Los Angeles and San Francisco.

(Testimony of Herman H. Pierson.)

Q. Did that work entail generally the same duties with respect to a relation with the Government, inspection, repairs and provisioning, as you described with respect to the De La Rama [27] Steamship Company?

A. It did. They had a port captain, a port engineer, and a port steward working out of our San Francisco office under my jurisdiction.

The Court: Q. Who fixed the salaries of the people whom you employed? A. Mr. Suewer.

Q. For instance, you fired a man here or a man quit here and you wanted to employ someone else, who would determine that matter?

A. Replacement on the basis of the same salary. We would replace the position on the basis of the same salary.

Q. Suppose you wanted to raise a man's salary?

A. I would have to take that up with Mr. Suewer.

Q. And get his approval first?

A. Yes, sir.

The Court: Go ahead, Counsel.

Mr. Partridge: Q. Getting to that particular phase of it, did Mr. Suewer have occasion to visit your territory from time to time?

A. I think he averaged about two trips a year to California.

Q. Was that both before the war and after?

A. Before the war he used to come out about once a year.

Q. Just one more question before we get to this matter of salaries. Did your duties increase dur-

(Testimony of Herman H. Pierson.)

ing the war years [28] over those devolving upon you before the war, or not?

A. Much greater duties. It involved more time than before the war, because we had a constant follow-up system that we had to follow to keep the vessels moving.

Q. If you could reduce it to percentages, did you do twice as much work, three or four times as much work?

A. I would say the work increased at least four or five times.

Q. The work increased four or five times over what?

A. Greater than it was before the war.

Q. How many vessels, for example, on an average, would touch this port during the war that were under your supervision?

A. Between Los Angeles and San Francisco I would say we had anywhere from five to ten vessels in port at all times.

Q. As distinguished from one a month on your other service? A. That is right.

Q. And one every 21 days on whichever one of those two services it was. At some time or other in 1943, Mr. Pierson, you received an increase in your salary, did you not? A. Yes, sir.

Q. What were you earning before that time?

A. $600 a month.

Q. Was that the same salary you had been earning before the war?

A. That was the salary I went to work for the

(Testimony of Herman H. Pierson.)

corporation on, when I went to work for them. [29]

Q. Then was that salary increased in 1943?

A. It was.

Q. Do you remember approximately when?

A. I think it was October, 1943.

Q. Was that after discussion with Mr. Suewer?

A. I got authority from him to raise my salary in line with the raise of the employees.

Q. Were other raises then obtained for employees of De La Rama?

A. For all the employees, in fact, because our scale on that was below—in fact, I knew it was below the scale of the other steamship companies, that the other steamship companies were paying.

Q. Did you or did you not call that to Mr. Suewer's attention, the fact that in your opinion the wage scale was lower than that of other companies? A. I did, sir.

Q. Did he authorize this increase of your salary to whatever it was increased? A. He did.

Q. Do you remember the amount of your salary thereafter?

A. The first increase went from $600 to $708.

Q. Was an application filed by the company or by you on behalf of the company for authority of the Salary Stabilization Unit of the Internal Revenue Department, to increase— [30]

A. I filed that statement.

Q. At whose direction?

A. By the direction of Mr. Suewer.

Q. Was there any discussion or authority whatsoever sought from anyone other than Mr. Suewer?

(Testimony of Herman H. Pierson.)

A. No.

Q. Or given by anyone other than Mr. Suewer?

A. Not on the wage question.

Q. Did you have other discussions with Mr. Suewer respecting the wages paid by the company to yourself and other key men?

A. I discussed that with them on the basis that we were below what other people were paying, and we would lose our key men if we did not do something about it.

Q. Was that one discussion, or were there more than one discussion?

A. There was more than one discussion.

Q. Did you mention yourself as one of those whom they would lose, unless something were done about it?

A. I naturally did, being a key man.

Q. At least you so considered yourself, did you? All right. You have alleged in your complaint that in February, 1944, you entered into an agreement with Mr. Suewer in behalf of the company. I direct your attention to any discussion you had with Mr. Suewer in February, 1944, particularly regarding your salary, and if it was a part of the discussion, about [31] other salaries?

A. The main discussion, as I recall, at that time was that I brought out the point that our key men were not getting the salaries that were paid by other steamship companies, and that we had to do something to keep our key men and work out some arrangement so they would get comparable salaries, and he spoke up about a bonus which

(Testimony of Herman H. Pierson.)

—call it a bonus, although I didn't consider it would be on the same basis as a bonus. It was more on the basis of working out something to make up the difference of a comparable salary paid by other corporations at the time during the war, and knowing the authority that he had, he was going to recommend certain things to the board of directors, and I felt positive his recommendation would be followed.

Q. What did he say with respect to the things he was going to recommend to the board of directors? Will you tell the court as best you can what he represented to you on that occasion?

A. Do you mean as far as the salary was concerned?

Q. No, you said he was going to recommend. Will you tell the court the substance of what Mr. Suewer told you?

A. He told me that he thought a comparable salary—I mean a bonus worked out on a basis of a comparable salary—in other words, if somebody was getting $1000 a month and I was getting $600 a month, he figured we should get $400 a month during the war period to make up the difference.

Q. You mean an employee or someone outside of your company? A. That is right.

Q. What did he say he would do with respect to having such an additional compensation paid you? What did he say he would do about it?

A. He said he would make the representation and felt sure his recommendation would go—in fact, he expressed himself that he would insist upon

(Testimony of Herman H. Pierson.)

them paying it.

Q. Did he say anything about his own salary and what he intended to do about that at the conclusion of the war?

A. He did. He said he was only drawing the same salary he had drawn before the war, and he would certainly have an understanding and see that he got the proper remuneration.

Q. Did he or did he not assure you his recommendations would be followed by the board?

A. He impressed upon me very strongly that they would be.

Q. What did he say, if anything, with respect to your statement that the salary scale of De La Rama was less than that of other companies in the same field? A. He appreciated they were below.

Q. Not he appreciated they were below; do you mean he said he appreciated that?

A. He said he believed our scale of wages was below the scale of wages paid by other steamship companies for similar positions. [33]

Q. Did discussions of similar import take place on more than this one occasion, or was that the only time?

A. That was the main discussion, but the thing was discussed on other visits out here.

Q. Generally to the same effect?

A. Along the same lines, correct.

Q. Did you know at that time that the salary scale paid to you and your other key men was less than that paid by similar steamship companies for similar jobs? A. Yes, sir.

(Testimony of Herman H. Pierson.)

Mr. Aldwell: I think that calls for the conclusion of the witness, your Honor, and is based on hearsay. If he got any direct information or direct evidence, he can give it, but the way your question is worded, counsel, it just calls for a conclusion.

Mr. Partridge: I think that that would be a matter of cross-examination, your Honor, rather than hearsay. I believe he can clearly express his view that he knows the wage scales were higher. The matter of how he knew is one for cross-examination.

The Court: I think that objection is good, Mr. Partridge. He may testify what conversations he had, but when you ask him to tell whether somebody else was paid more or less than he was paid, it would be hearsay.

Mr. Partridge: Very well. [34]

The Court: Unless you have some record, you have to have somebody else testify to that.

Mr. Partridge: Yes, I will produce such testimony.

The Court: Is that of any materiality, what other people were doing? The only question here involved is what, if any, agreement was entered into.

Mr. Partridge: Yes, except it is our position the agreement was this, your Honor, and I believe it has been developed by the testimony thus far: "We will adjust the wages so you men will get wages comparable to those paid by other steamship companies for the same job," without the amount specified, and therefore, if your Honor finds such an

(Testimony of Herman H. Pierson.)

agreement was made, your Honor will have to know what the comparable salaries were.

The Court: The only question then is, is this witness competent to testify to that?

Mr. Partridge: Yes.

Q. Tell me whether or not during the period of the war there was a shortage of competent steamship men. A. There was.

Q. Had you been approached by other steamship companies for jobs? A. I had been.

Q. Was that on more than one occasion during the war?

A. I was approached by several people at different times to [35] find out whether I would be interested in making a move.

Q. Did you leave that company, or did you stay on through with them?

A. I stayed with the company through the war.

Q. Performing the same duties that you described? A. Correct.

Q. Thereafter you resigned from the company, did you? A. Yes, sir.

Q. Did you have any discussion with Mr. Suewer upon the conclusion of the war respecting this bonus and what you propose to do about it when he was on his way to Manila?

A. I talked to him on the day I drove him up to Hamilton Field and he said he would be sure to take that bonus question up and get it settled in Manila.

Q. Thereafter he returned, did he?

A. When he arrived back in Los Angeles from

(Testimony of Herman H. Pierson.)

Manila I talked to him again then and he said he had been given full authority to work out the amounts, and the ones that were entitled to the bonuses.

Q. Did he discuss it any further than that with you? A. No, sir.

Q. Where did you see him then in Los Angeles?

A. In the Biltmore Hotel.

Q. Was he on his way East?

A. He was leaving the same afternoon. It was a Sunday morning [36] I saw him.

Q. Did he purport to be in a hurry and unable to discuss it in detail with you? A. He was.

Q. He told you that, did he?

A. That is right.

Q. At some time or other did you get a bonus or a check of the De La Rama Steamship Company that was entitled bonus, or words to that effect? A. I did.

Mr. Partridge: You have seen a copy of this, Counsel. I have a photostat of it. Do you have any objection to its use?

Mr. Aldwell: Not at all.

Mr. Partridge: Q. I will show you a document purporting to be a photostatic copy of a check—

The Court: If there is no objection, do you wish to offer it in evidence?

Mr. Partridge: Yes.

The Court: Any objection to it?

Mr. Aldwell: None, at all.

Mr. Partridge: May we stipulate that this pho-

(Testimony of Herman H. Pierson.)

tostatic copy is a photostat of a check of the De La Rama Steamship Company, dated July 14, 1946, and it is in the amount of $2500, less certain required deductions, required by law, your Honor.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Statement of Earnings and Deductions for Employee's Record Covering Pay Period to and Including Date Shown Below

The De La Rama Steamship Co., Inc.

90 Broad St., New York

Date Jul 15 1946

Issued to: H. H. PIERSON

DEDUCTIONS

Total Earnings	$2500.00
F. O. A. B.	.....
Insurance	.....
Withholding Tax	475.00
War Bonds	.....
Hosp. Assn.	.....
[Written in longhand]: Authorized by Board of Directors 7/11/46—Cable No. 40.	
Total Deductions	475.00
Amount of Check	$2025.00

Detach before Cashing and Retain This Statement

PLAINTIFF'S EXHIBIT No. 1

Pay Roll Check

5098 A No. 3766

THE DE LA RAMA STEAMSHIP CO., INC.
90 Broad Street

PAYROLL ACCOUNT

New York, Jul 15 1946

Pay to the Order of H. H. PIERSON.....$2025.00
The De La Rama S.S. Co., Inc.....$2025 & 00 Cts.....Dollars

/s/ R. F. SUEWER

/s/ [Illegible]

The Marine Midland Trust Company
1-108 of New York
210 17 Battery Place

Know Your Endorser—Require Identification

(Testimony of Herman H. Pierson.)

Mr. Partridge: Q. Was that the total amount received by you in addition to the compensation or wages you referred to?

A. Yes, sir.

Q. One more thing. Was your salary raised again in 1945? A. It was.

Q. Do you remember whether that was before or after the wage controls were on?

A. That was while they were still on, because they had to make application to get permission to pay the additional money.

Q. That was raised to what?

A. $750 a month.

Mr. Partridge: You may cross-examine.

The Court: We will take a brief recess at this time.

(Recess.)

Cross-Examination

Mr. Aldwell: Q. Mr. Pierson, when did Mr. Bradford come with the company?

A. I think it was in March or April in 1941.

Q. When did he leave?

A. February, 1942.

Q. During that time you have already testified he was assistant United States manager, is that correct? [38]

Q. Where was he located?

A. When he first came over, in the Marine Exchange Building in San Francisco, and then moved to 310 Sansome Street.

(Testimony of Herman H. Pierson.)

Q. He was in San Francisco?

A. Yes, that is right.

Q. He was over you, was he? A. Yes, sir.

Q. You testified in some detail, Mr. Pierson, about all of the arrangements that you had to make when you took over a ship under the agency agreement with the Government.

A. I think I could correct you on that, that I supervised those actions.

Q. Very well. I will stand corrected. Those details were no different, were they, from what any other steamship company would be doing at the same time? A. Correct.

Q. In other words, you just carried out the duties that were called for by the general agency agreement with the WSA? A. Correct.

Q. And every other steamship company did the same thing? A. That is right.

Q. And it did not make much difference, did it, whether you had 20 ships, or 100 ships? The procedure was the same? A. That is right.

Q. It was just a question of that much more work, and so far [39] as the increase of work during the war period was concerned, where you testified the work increased four or five times, that was also true of every other company in the business, wasn't it? A. That is right.

Q. So it was just a general industry situation?

A. That is right.

Q. You also testified in addition to the agency agreements which you had with the Government. you also acted as agent for States Steamship and

(Testimony of Herman H. Pierson.)

the Atlantic-Pacific Steamship Company of Vancouver, is that correct? A. Correct.

Q. States Steamship and Pacific and Atlantic Steamship are the same concern in fact, are'nt they?

A. Pacific-Atlantic is a subsidiary of the States Steamship Company.

The Court: You mean not the plaintiff individually as agent, but the De La Rama Steamship Company?

Mr. Aldwell: Yes. In referring to "you" I think we can stipulate we are referring to the De La Rama Steamship Company.

Mr. Partridge: At times we are.

Mr. Aldwell: For the purpose of this discussion it simplifies it a little, that is all, your Honor.

Q. This agreement you had with the Government, that was the [40] one that was generally known as the general agency agreement, was it not?

A. Correct.

Q. When you were acting as agent for States and the Pacific-Atlantic, you were really acting under another Government contract, weren't you?

A. We were acting as the—we were the States Line agency, which had a similar general agency contract, the same as the De La Rama Steamship Company had.

Q. And you acted as sub-agent?

A. That is right.

Q. In other words, really you were still acting for the Government, but you just made your accounts through the States? A. That is right.

(Testimony of Herman H. Pierson.)

Q. You testified on your direct examination that you were offered jobs by other steamship companies? A Correct.

Q. What steamship companies offered you jobs?

A. Well, I can say one who approached me was the Perry Steamship Company.

Q. Did they mention any specific salary they were going to pay you?

A. Their approach was would I be interested in making another connection, and I told them I was very happy where I was.

Q. And you never got down to any details with respect to salary? [41]

A. We never went into further discussion.

Q. What other steamship companies approached you?

A. The States Marine Corporation.

Q. Can you fix any particular date as to when the other companies approached you?

A. I think the States Marine was in 1943, if I remember correctly. I think Perry was in the same year.

Q. Were there any other companies that approached you?

A. No, sir, not that I recall.

Q. Now, you have testified you were paid a salary of $600 a month starting in 1940, when the De La Rama Steamship Company took over.

A. Correct.

Q. Up until you got this raise in 1943?

A. Correct.

Q. Now, you got a raise in 1943? A. Yes.

(Testimony of Herman H. Pierson.)

Q. You testified on direct examination that that was in October, 1943.

A. I think that was the date.

Q. As a matter of fact, that was retroactive to April 8, was it not?

A. I think it was, yes. The authority was granted in October.

Q. The authority was granted in October?

A. That is right. [42]

Q. It was retroactive to April 8th?

A. I think that was the date.

Q. So in effect you were receiving $708.33 a month from April 8, 1943 on?

A. That is right.

Q. And in addition you received one month's salary at Christmas time? A. Correct.

Q. Each year? A. That is right.

Q. And that was based upon the amount of your monthly salary at that time? A. Correct.

Q. So your bonus in 1942 was $600?

A. Yes.

Q. And your bonus in 1943 was $708.33?

A. I couldn't say definitely, but I imagine that is what it was. I don't know whether they prorated that on the year basis, or not. I don't remember.

Q. In 1944, in any event, your bonus would be $708.33? A. Correct.

Q. Now, you received another raise in 1945?

A. Yes, sir.

Q. That was the raise to $750?

(Testimony of Herman H. Pierson.)

A. That is right. [43]

Q. Do you recall when that was effective?

A. I think it was May, if I remember. Is that correct?

Q. It may have been granted in May, but wasn't it effective as of March 17th?

A. There is a possibility. I don't recall right now.

Mr. Partridge: What was that date, Counsel?

Mr. Aldwell: March 17th.

Mr. Partridge: Have you the records so indicating?

Mr. Aldwell: Yes.

The Witness: I know there was a little delay getting permission from the Government agency.

Mr. Aldwell: Q. Particularly in the first there was a considerable delay?

A. Yes, around six months.

Q. As a matter of fact, you had to go down and discuss it with them? A. That is right.

Q. And you also had to discuss the one in 1945?

A. That is right.

Q. You received a Christmas bonus in 1945 also, I presume? A. Yes, sir.

Q. That would be $750?

A. If they didn't pro-rate it, it was, I agree.

Q. You prepared and signed on behalf of the defendant the applications to the Salary Stabilization Unit for these increases, [44] did you not?

A. Yes, sir.

Q. And you also testified that you discussed

(Testimony of Herman H. Pierson.)

those matters with Mr. Suewer, and with his authorization and approval, you made those applications to the Treasury Department?

A. That is correct.

Q. In addition to the written applications which you made to the Treasury Department, you also had conferences with them, didn't you?

A. Had some what?

Q. Had some conferences with them.

A. Oh, yes—you mean with Mr. Suewer?

Q. No, with the Treasury Department.

A. Oh, yes, had to go up there several times when these applications were put in.

Q. Both on the 1943 raise and the 1945 raise?

A. That is right.

Q. In making these applications to the Treasury Department for these raises you had to give some reasons, did you not, as to why the raises were necessary? A. That is right.

Q. What were those reasons?

Mr. Partridge: I do not think that question calls for the best evidence. If you are asking him what he set forth on the applications, if you have them, he can look at them, [45] but I think it is rather dangerous to try to recall now what was put down.

Can you direct your examination to some other phase while I read these?

Mr. Aldwell: I would just as soon stay on this.

Mr. Partridge: May I have the opportunity to look at it quickly?

(Testimony of Herman H. Pierson.)

Mr. Aldwell: Q. I will show you what purports to be a copy of a letter dated June 18, 1943, addressed to the Treasury Department, Bureau of Internal Revenue, Salary Stabilization Unit, San Francisco, purporting to be signed "De La Rama Steamship Company, Inc., H. H. Pierson," and ask you if that is a copy of a letter which you addressed to them?

A. I would say that is a carbon copy of a letter I did send them.

Q. In this letter you state as follows:

> "Furthermore, in comparing our salaries with other steamship companies, we feel it is absolutely necessary that you grant these increases and hold our force together, because on a competitive basis other steamship companies could offer our employees similar positions and pay them higher salaries, as their standard of pay is higher than ours."

Do you recall that statement? [46] A. Yes.

Mr. Partridge: Q. Will you try to answer audibly, Mr. Pierson, so the reporter can get it?

A. Yes.

Mr. Aldwell: Q. Now, this particular application that was covered in this particular letter included, of course, your proposed raise to $708.33. That was the amount that was asked for, wasn't it?

A. Yes, sir.

Q. And that was the amount that was granted. Did you feel at that time that if you got that raise to $708.33 you would then be in a comparable position with people in other steamship companies?

(Testimony of Herman H. Pierson.)

A. No, I didn't at the time, but it was the most we figured the board would grant; in other words, we asked for the limit that we felt would be granted.

Q. In your discussions with the Treasury Department, did you have any discussion as to what comparable steamship companies were paying?

A. My stand was they had all the figures of the other steamship companies. They knew what they were paying. They didn't have to ask me what they were paying.

Q. That was the same position you took in 1945 also, was it? A. Correct.

Q. To get down to this discussion you had with Mr. Suewer in [47] February, 1944, as a matter of fact Mr. Suewer volunteered to you, did he not, the information that he would recommend a bonus at the end of the war?

A. After our discussion he admitted he would go after the directors for it.

Q. Did you discuss with him at that time the matter of his authority to either recommend or to pay or to grant this bonus?

A. I felt, in fact I knew what his authority was, as far as his power of attorney—

The Court: Q. He wants to know whether you talked with him about it, not what you felt. What did you say?

A. I discussed it with him, yes.

Mr. Aldwell: Q. What was the nature of that discussion?

(Testimony of Herman H. Pierson.)

A. With his authority they would willingly grant what he recommended.

Q. Didn't he state to you that he did not have any authority to grant any bonuses at that time?

A. At that time he did not. I mean in other words in 1944 he couldn't give us a bonus then.

Q. And he stated to you that he did not have any authority to grant them then?

A. I do not recall whether he made that statement, or not, but he said he could not—at the present time he could not make—he could not pay any bonus then, but he would take it [48] up and felt with his authority and recommendation, the board of directors would grant it.

Q. As a matter of fact, they did grant it, didn't they? A. To the amounts they paid, yes.

Q. In your discussions with Mr. Suewer you did not get down at any time to a discussion of amount, did you? A. Any actual amount?

Q. Yes. A. No.

Q. There was never any mention of it, was there?

A. Not as to whether it would be $5000, $2000, no. It was always based upon what would be fair compensation for the work we were doing under the circumstances we were working.

Q. That last statement that you just made was not a part of any discussion you had with Mr. Suewer; that was just your own impression, isn't it?

A. No, no. The thing was discussed with him

(Testimony of Herman H. Pierson.)

on the basis of what we would shoot at. No actual amount was stipulated.

The Court: Q. What did he say that he would do?

A. He said he would recommend to the board of directors, and felt positive they would follow his recommendations.

Mr. Aldwell: Q. Recommend what, Mr. Pierson?

The Court: That is what I am trying to get at.

A. The amount of money that would be paid. It would be on the basis of the salary we should have received, in comparison [49] with what other steamship lines were paying.

The Court: Q. Is that what he said?

A. Make up the difference, correct.

Mr. Aldwell: Q. Did he say he would recommend it on that basis?

A. Yes, sir.

Q. But as far as the amount was concerned, you had to trust in Mr. Suewer, didn't you?

A. That is right.

Q. And you did trust him? A. I did.

Q. To go back for a moment to these other offers you received, Mr. Pierson, who was it in Perry who approached you? What is the name of the individual? A. Charley Perkes.

Q. How about the States Marine?

A. Green, I think his name is.

Q. You testified on your direct examination also, to get back again to this discussion in February,

(Testimony of Herman H. Pierson.)

1944, that the arrangement was that these bonuses would be for key men, and I believe you stated you, yourself, were not specifically mentioned.

A. That I myself, what?

Q. Were not specifically mentioned.

Mr. Partridge: I think you are unintentionally misquoting his testimony. [50]

Mr. Aldwell: I was not intentionally doing so.

Mr. Partridge: I said unintentionally. I think he said including himself.

Mr. Aldwell: That is just what I was coming to, whether that was just his impression.

Mr. Partridge: I did not mean to interrupt you. I am sorry.

The Witness: You mean in the discussion I did not mention to them myself as a key man?

Mr. Aldwell: Q. That is right.

A. In the discussion I said key men. I didn't mention anybody in particular. I just mentioned key men. That would take care of all the key men.

Q. That is what I am trying to get at.

A. Which would include myself, being a key man.

Q. That was your assumption. You are assuming you are a key man?

A. Naturally. If I did not, maybe somebody else would not.

Q. I just wanted to get it straight here. This discussion did not get down to actual individuals?

A. No.

Q. It was just key men as a group?

(Testimony of Herman H. Pierson.)

A. That is right.

Q. And there was no mention whether you, in particular, or McMannus in particular, or Middleton in particular would be [51] getting these bonuses? A. That is right.

Q. It was just the key men.

The Court: Q. Is that right?

A. Correct.

Q. In other words, Mr. Suewer said the recommendation that he would make for these bonuses to the directors would be for the key men?

A. Correct.

Q. That was the subject of your discussion, is that right? A. That is right.

Mr. Aldwell: No further questions.

Mr. Partridge: You have handed me, Counsel, copies of the three letters addressed to the Treasury Department, and without questioning the witness on the subject I presume you will stipulate that each of them is a true copy of the communications addressed to the Treasury Department by the De La Rama Steamship Company and signed by Mr. Pierson?

Mr. Aldwell: So stipulated.

Mr. Partridge: You may step down now, Mr. Pierson, and at this time I would like to offer these letters in evidence, and while it may take a moment I would like permission to read them to your Honor, because I think they have a continuity that will be valuable.

The Court: All right. [52]

Mr. Partridge: A letter of June 18, 1943, which I will offer first in evidence.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 2.)

Mr. Partridge: It is addressed to the Treasury Department, Bureau of Internal Revenue, Salary Stabilization Unit, 100 McAllister Street. May I withdraw that offer at this time? I have a witness here and think we can possibly put him on and finish with him by the noon hour, if it please the court, so I would like to have permission to change my mind.

The Court: Very well.

BENJAMIN H. PARKINSON,

called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

The Clerk: Q. State your name to the court?

A. Benjamin H. Parkinson.

Direct Examination

Mr. Partridge: Q. Where do you live, Mr. Parkinson? A. San Francisco.

Q. What is your business or occupation?

A. Secretary-treasurer of Coastwise Line.

Q. Any other office with any other steamship company?

A. I am general manager of the Coastwise Pacific Far East [53] Line, treasurer of the Columbia Basin Terminals and other similar—

Mr. Aldwell: Will you speak a little louder?

The Witness: I am secretary-treasurer of the

(Testimony of Benjamin H. Parkinson.)

Coastwise Line, general manager of the Coastwise Pacific Far East Line, treasurer of the Columbia Basin Terminals, and other similar positions.

Mr. Partridge: Q. Those lines all relate to the steamship business, do they?

A. They do, yes.

Q. Have you been in the steamship business for some number of years? A. I have.

Q. Have you known Mr. Pierson for some number of years? A. I have.

Q. One of the issues raised by the deposition of Mr. Suewer, which is not before your Honor, but I say this in explanation here of the questions addressed to this witness, is that Mr. Suewer said the bonus paid to Mr. Pierson was in part fixed by him, because he considered Mr. Pierson inefficient in certain respects.

Have you known Mr. Pierson, the plaintiff in this case, for sometime? A. I have.

Q. Have you known him in the steamship business, and particularly [54] while he was with the De La Rama Steamship Company?

A. I have, yes.

Q. And before that did you likewise know him?

A. Yes.

Q. Have you been located generally in San Francisco in connection with your steamship career and during it? A. I have, yes.

Q. The Coastwise Lines is domiciled where?

A. 222 Sansome Street.

Q. Where is its home office, San Francisco?

(Testimony of Benjamin H. Parkinson.)

A. That is our home office, yes.

Q. Are you steamship agents?

A. Yes, sir.

Q. For what lines, among others?

A. The United States Lines Company, Pacific Tankers, Pacific Far East Line, Union Sulphur and other lines. Is that enough?

Q. Yes, that seems to be a great many.

Mr. Aldwell: Excuse me, Counsel. I hate to interrupt. Is he talking about San Francisco now?

Mr. Partridge: Q. Are you talking about San Francisco?

A. I am talking about various offices where we may represent those companies. I do not know how detailed you want it, but, for example, we are agents for all of those companies in Seattle and Portland, and our agencies have been in San Francisco and Los Angeles, or wherever those companies have [55] their own offices.

Q. Without repeating, but to satisfy counsel, whom do you represent in San Francisco?

A. Whom do I represent in San Francisco?

Q. Yes, what lines?

A. Well, at the present moment we represent only ourselves in San Francisco.

Q. During the war what lines did you represent?

A. During the war we conducted all of the activities of the United States Lines Company on the Pacific Coast. We organized the Pacific Tankers. We organized the Pacific Far East Line. We organized other companies along that line.

(Testimony of Benjamin H. Parkinson.)

Q. Were you here during the war years?

A. I was here during the war years, yes, sir.

Q. Were you in touch with Mr. Pierson during the war years.

A. I was to the extent that I was in touch with other steamship people in San Francisco.

Q. Will you state to the court whether in your opinion Mr. Pierson was, during the war years, and is, a capable and efficient steamship manager?

Mr. Aldwell: I object to that, your Honor. There is no foundation laid for that.

The Court: I think that is a good objection at this time.

Mr. Partridge: Of course, I qualified the gentleman as having a wide experience in the steamship business. [56]

The Court: I do not think that is the point. His objection is you have to lay some foundation of his knowledge of Mr. Pierson before he would be qualified to testify.

Mr. Partridge: I will try to lay a better foundation.

Q. Are you familiar with the duties of a manager of a steamship line on the Pacific Coast because of your experience in the business, or otherwise? A. I am, yes.

Q. And particularly during the wartime?

A. Yes, sir.

Q. Did you have occasion during the wartime period, before and after, to observe Mr. Pierson in the performance of his duties as Pacific Coast

(Testimony of Benjamin H. Parkinson.)

Manager for the De La Rama Steamship Company?

A. Well, I have never been in his office to observe his operations, but my impression from talking to him and knowing the work that was going through his office, and talking to other steamship people in the same position, I have always had the impression Mr. Pierson was a capable, experienced, and efficient steamship man.

Mr. Aldwell: I move to strike that answer, your Honor, as a conclusion of the witness, hearsay, and again there is absolutely no foundation laid for any such testimony.

Mr. Partridge: Of course, the proof of integrity, the proof of efficiency, proficiency, is based upon intangibles from the very nature of it. [57]

The Court: I don't know whether this sort of testimony would be admissible on the same theory that people's reputations are admissible in evidence. That would be about as far as the witness could go, I suppose. He knows what other people may have said to the plaintiff, and what his opinion of him was from such contacts he may have had with him, but that really is more a question as to reputation than it is as to actual knowledge in detail of the manner of the conduct of the business. For example, I am not wanting to be facetious about it, but Mr. Pierson, for example, may not have accounted for some moneys to his own company and this gentleman might not know anything about it. There are a thousand and one things

(Testimony of Benjamin H. Parkinson.)
that might happen that would detract from the basis of the qualification of the witness to testify as to wether the defendant were an efficient man in the business. I think you would have to have someone who would be more qualified.

Mr. Partridge: I am going to call other testimony in that respect, too, but I am going to adopt the court's suggestion if for nothing more than I think it is an excellent one to save time, and I will ask the witness that very question:

Q. Can you state to the court the reputation that Mr. Pierson bears with respect to his efficiency and proficiency as a manager of a steamship company?

Mr. Aldwell: I am going to object to that one, too, [58] your Honor.

The Court: Technically, I think the objection is good, but whatever the witness might say in that regard would only bear on the weight of the testimony. I will overrule the objection.

Mr. Partridge: Q. Do you understand the question? A. May I have it?

The Court: Q. Did Mr. Pierson have a good reputation as a steamship man in the steamship fraternity, so far as you know?

A. So far as I know, Mr. Pierson has an excellent reputation in the steamship fraternity, and I never heard any criticisms to the contrary.

Mr. Partridge: Q. Mr. Parkinson, in your experience as an executive in the steamship business will you state to the court whether or not you

(Testimony of Benjamin H. Parkinson.)

became familiar and aware, and are familiar and aware of salaries generally paid by the steamship companies on this coast during the wartime period?

Mr. Aldwell: You are restricting this now to his own personal knowledge?

Mr. Partridge: Yes.

A. Well, I am familiar with salaries paid to various positions on the Pacific Coast, but I might say it is confidential information.

Mr. Partridge: Q. We have not gotten quite to the point where we are asking you to divulge any confidential information. [59] Were you familiar generally with the duties of Mr. Pierson as Pacific Coast Manager of the De La Rama Steamship Company during the war years?

A. Well, I fully recognize the duties and responsibilities of the Pacific Coast Manager who is representing a company having a War Shipping Administration War Agency agreement and performing as sub-agent for other companies, from what I have heard here this morning.

Q. You have been in court and listened to Mr. Pierson's testimony on the subject?

A. I have been and did.

Q. On that basis, and based upon your own knowledge of his duties during the war, whatever that may have been, can you state to the court what, in your opinion, is the reasonable value of his services for that period?

Mr. Aldwell: I will object to that, your Honor,

(Testimony of Benjamin H. Parkinson.)

as not within the issues of the case. As I understand counsel's position, the contract is to pay Mr. Pierson a salary for comparable duties in a comparable steamship company. That is not the question counsel is asking the witness. He is asking him what the reasonable value of his services is.

(Discussion of motion.)

The Court: To save time, I will let this testimony go in, and then if it is not competent I will not pay any attention to it, or counsel can make a motion to strike it out. [60]

Mr. Aldwell: It is stipulated it may go in subject to a motion to strike.

The Court: Yes.

Mr. Partridge: Q. Will you answer the question, Mr. Parkinson, or have you forgotten it? It was, in your opinion what is the reasonable value of the services of a person occupying a position of Pacific Coast Manager and discharging the duties that you are aware Mr. Pierson was required to discharge during the war for the De La Rama Steamship Company?

A. I would say a man of his experience, having full charge of operations on the Pacific Coast, as I have heard it testified here, taking delivery of some 24 vessels and serving as sub-agent for others, with two officers and 35 employees, I would say his minimum salary should be $12,000 a year.

Q. Can you tell the court, from your experience in the steamship business, what comparable

(Testimony of Benjamin H. Parkinson.)

salaries were paid to other employees in the steamship fraternity holding positions comparable to that of Mr. Pierson?

A. Well, as stated a little while ago—

Q. I am not asking you at this time to name any particular one, Mr. Parkinson, but do you know what salaries were paid for comparable jobs?

The Court: Q. He wants to know whether you have a familiarity on that, whether you have knowledge, without disclosing what the salaries were, what salaries were paid. [61]

A. I wanted to say I do not know of any identical position, that those things would run in a sort of bracket rather than as you pointed out, and it depends on what the man's responsibility is, whether he acted of his own knowledge, or had to get direction and things like that. But I know of a salary with lesser responsibility that was getting, say, $12,000, if that helps any. I know of a salary for considerably less than that responsibility which was $9,000, and probably with a bonus might have made it $10,000.

Mr. Partridge: Q. What bracket would you put these salaries within, Mr. Parkinson?

Mr. Aldwell: I move to strike that last answer of the witness on the ground that it is too vague and indefinite.

The Court: I will grant the motion.

Mr. Partridge: That is the portion of it in which he stated the salary that he knows is connected with considerably less responsibility?

(Testimony of Benjamin H. Parkinson.)

Mr. Aldwell: Both of them.

The Court: Yes.

Mr. Partridge: Q. Can you tell the court of your own knowledge what salary bracket, to adopt your description of it, a job of this sort would fall within in the steamship fraternity?

A. Very generally I would say it would fall in a bracket from $10,000 to $15,000. [62]

Mr. Partridge: You may cross-examine.

Cross Examination

Mr. Aldwell: Q. Mr. Parkinson, when you say this bracket of from $10,000 to $15,000, of what period are you speaking?

A. Well, I would say during the past seven years.

Q. You are not making any allowances for any increases during that time? Do you mean to say it would be $10,000 to $15,000 on December 7, 1941 and $10,000 to $15,000 on August 14, 1945?

A. My estimate of that bracket can't come that close. I would say somewhere between there, depending on the responsibilities of the man, his capabilities, his past experience, and what would satisfy him. After all, when you get up in that bracket of salaries it is not like a wage for an able-bodied seaman, or like that. You have to take your intangibles and it is very difficult for me even to testify to that.

Q. I realize that as a matter of fact there are a very great number of intangibles, isn't that correct, that go into the factor of fixing steamship companies' executives' salaries, are there not?

(Testimony of Benjamin H. Parkinson.)

A. Yes, sir.

Q. There are such things as family connections that enter into it with some companies?

A. I would say a man's ability to get business, whether it is [63] because he is related to someone, or knows how to do it is a consideration.

Q. There wasn't any question of getting business during the war, was there?

A. Well, I may have misunderstood your question then. You asked me if a man's family relations would affect his salary?

Q. Yes.

A. I can conceive of any number of conditions where it would. I can see where a father might pay a son a salary or something like that—is that what you mean?

Q. That is right, and other factors are involved. There are such things as the ability to obtain certain cargoes; in other words, if a man is in a position, say, to deliver all the cargoes of the United States Steel to a particular company, that is a factor that would be taken into account by an employing steamship company, wouldn't it?

A. Yes, except I would not call that a salary.

Q. Well, we are talking about a bonus. In fixing this $10,000 to $15,000 bracket, what steamship companies have you taken into account?

A. I consider that—I am not able to testify to that, because I am not privileged to divulge any specific salaries, and that is as far as I can go, if that much is satisfactory.

(Testimony of Benjamin H. Parkinson.)

Q. In other words, you feel that you are not in a position to [64] disclose any particular companies? A. That is true.

Mr. Aldwell: If that is the case, your Honor, I move to strike all the witness' testimony, if I can't go into the question of what he bases his testimony on.

The Court: You are moving now to strike all of his testimony?

Mr. Aldwell: All of his testimony with regard to salaries, yes, sir.

The Court: I would not want to strike all of his testimony. He gave some testimony as to what he considered the reasonable value was.

Mr. Aldwell: Let me narrow it this way: I move to strike all of his testimony with regard to salaries paid by so-called comparable steamship companies.

The Court: I think that motion is good. I will grant that.

Mr. Aldwell: Q. Are you a friend of Mr. Pierson's, Mr. Parkinson?

A. I beg your pardon?

Q. Are you a friend of Mr. Pierson's?

A. Yes.

Q. Do you meet with him socially at all?

A. I have on occasions, yes.

Q. Did he ever work for you?

A. No, he never has. [65]

Q. So actually you have never been in a position where you could observe the actual work performed by Mr. Pierson for his employer?

(Testimony of Benjamin H. Parkinson.)

A. I have never been in that position.

Mr. Aldwell: No further questions.

Mr. Partridge: I have no other questions. May Mr. Parkinson be excused now from the jurisdiction of this court?

The Court: Yes. We will take a recess until two o'clock.

(A recess was taken until two o'clock p.m.)

Afternoon Session

November 6, 1947, 2:00 p.m.

Mr. Partridge: May it please the Court, during the limited period of time permitted by the noon recess, I have accumulated four cases directed toward the legal proposition that the value of the services of Mr. Pierson, are not being fixed by any particular amount, but left, as the evidence now establishes it was left, at this stage of the proceedings may be fixed by the opinion of people who being familiar with the services, and whose background is in the judgment of this court sufficient to enable them to pass on the value of the services, and they may express their view in that regard based upon their knowledge of the facts and their experience in the trade.

(Discussion.)

The Court: It is a little early, of course, to argue this matter, and perhaps a little dangerous to do that, because of the possibility of getting preconceived views of the matter, but the plaintiff

has not testified to any agreement to pay any salary of any kind. He testified, as I recall his testimony, that the United States Manager said he would get an extra bonus for the key men for their services during the war period. I suppose that might be interpreted to mean compensation for services rendered.

Mr. Partridge: Your Honor will recall that it was testified that it was agreed he would pay such extra bonus or [67] compensation as together with the salary paid during the war would bring the total compensation of the key men up to whatever similar corporations paid in comparable positions, and their fair compensation for the services. I will call Mr. McManus.

JAMES A. McMANUS

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

The Clerk: Q. State your name to the court.

A. James A. McManus.

Direct Examination

Mr. Partridge: Q. Where do you reside, Mr. McManus?

A. 241 Twenty-ninth Avenue, San Francisco.

Q. What is your business or occupation?

A. My present occupation is operating manager for Pacific Transport Lines.

Q. And the Pacific Transport Lines is engaged in the steamship business, is it?

A. They are engaged in the steamship business,

(Testimony of James A. McManus.)

operating port service, trans-Pacific.

Q. In the City and County of San Francisco?

A. Correct.

Q. How long have you been in the steamship business? A. Since 1928. [68]

Q. Prior to coming with Pacific Transport Lines, with what company were you associated?

A. I was employed by De La Rama Steamship Company.

Q. For what period of time?

A. From November 1, 1941 to May 30, 1946.

Q. Prior to that time with what company were you associated?

A. I was employed by Williams Dimond Company.

Q. That company, too, is engaged in the steamship business?

A. Agency, yes, steamship business.

Q. How long were you with the Williams Dimond Company?

A. Since 1928, up to the time I went with De La Rama.

Q. While you were with De La Rama was Mr. Pierson there likewise? A. Yes, he was.

Q. Did you go over to De La Rama at or about the same time Mr. Pierson did?

A. No, Mr. Pierson, I believe, preceded me to De La Rama by about two years.

Q. Did you work hand in hand with Mr. Pierson during your period of service at Williams Dimond, or were your duties divergent?

(Testimony of James A. McManus.)

A. At Williams Dimond I had quite a few contacts with him; however, we were in different developments or phases of the business.

Q. When you went over to De La Rama was Mr. Pierson your [69] superior or not?

A. He was my superior. I reported directly to him.

Q. What was your job at De La Rama?

A. Assistant operating manager.

Q. Where were you located?

A. In San Francisco.

Q. Will you tell the court the nature and extent of your contact with Mr. Pierson during your period of service with De La Rama, that is to say. were you in constant contact with him, or what was the situation.

A. I was not only in daily contact, but contact with him innumerable times throughout the business day.

Q. Did you or did you not observe Mr. Pierson in the performance of his duties for De La Rama Steamship Company while you were there with him? A. Daily.

Q. Will you state whether or not in your opinion he, Mr. Pierson, performed those duties in an efficient and proficient manner?

Mr. Aldwell: I object to that question, your Honor. I do not think any proper foundation has been laid for this witness to testify on that score. He has already testified he was subordinate to Mr. Pierson. I think the proper testimony would be

(Testimony of James A. McManus.)

adduced as to the proper performance of his duties by someone who was his superior. [70]

The Court: This witness says he is now the manager of another steamship company.

Mr. Partridge: Yes, your Honor.

The Court: That objection would be only as to the weight of the testimony. I will overrule it.

Mr. Partridge: Q. The court said you may answer, Mr. McManus.

A. In my opinion, Mr. Pierson was a very capable steamship executive. There were a good many things I did not know about when I was promoted into this position of assistant operating manager, and without his guidance and assistance and recommendations I would certainly have found it very difficult to carry on and perform the work that I did. I have a very high regard for his ability and a very keen appreciation of what he has taught me, and the assistance he gave me.

Q. Are you referring now particularly to the time at which you both worked for De La Rama?

A. That is correct.

Q. Did he, in your judgment, capably perform his duties as manager of that company?

A. So far as I know, yes. He was always available for guidance, help and advice.

Q. Mr. McManus, will you state to the court whether or not you were familiar with the duties of Mr. Pierson as Pacific Coast Manager during the period that you were there with De [71] La Rama?

(Testimony of James A. McManus.)

A. I do not quite understand the question.

Q. I want you to tell the court if it is a fact, or whatever the fact is, rather, that you were or were not familiar with the duties of Mr. Pierson during the period you were both employed by De La Rama Steamship Lines, and during the war, that is to say, were you and are you familiar with them? In other words, did you know what he did?

A. That is correct.

Q. You did know what he did during that period, did you? A. That is right.

Q. Will you tell the court what, in your opinion, the reasonable value of the services for performing such duties was during that war period?

Mr. Aldwell: I object to that, your Honor. There is no foundation laid as to this witness' competency to testify on that point.

The Court: I do not think there is any foundation, Counsel. If I was a salesman at the Emporium, would I be in a position to give expert testimony as to the reasonable value of the floorwalker, or the head of the department? I doubt if there is sufficient basis for that. I think an expert witness would have to be familiar with what the services of men of that type are worth, because of experience in hiring them, or because of the collection of information on that [72] subject or any other basis by which an expert acquires knowledge on that subject, or at least if not an expert, one who is well-versed in that.

Mr. Partridge: May I withdraw the question in an effort to further qualify the witness?

(Testimony of James A. McManus.)

Q. You were assistant traffic manager, did I understand you to say?

A. No, assistant operating manager.

Q. Assistant operating manager for that company. Were you the next in line, so to speak, for the company after Mr. Pierson?

A. At San Francisco?

Q. Yes.

A. In Los Angeles, however, there was the assistant Pacific Coast Manager.

Q. You have told us, as far as your experience was concerned, you were with William Dimond for twelve years prior to coming with De La Rama, were you? A. That is correct.

Q. Then with De La Rama for the number of years you have expressed. During your career with steamship companies, both with Williams Dimond Line and the De La Rama Line, will you tell the court whether or not you became familiar generally with salary scales or wages paid by steamship agencies and steamship lines in this locality? [73]

A. I believe generally I became acquainted — familiar with what most companies were paying generally.

Q. Without regard to the particular job, will you tell the court whether, because of your experience you have recited to us, you were and now are aware of what companies were paying for a position of Pacific Coast Manager of their steamship lines, and for duties similar to those you know were discharged by Mr. Pierson?

(Testimony of James A. McManus.)

A. I do not know that answer specifically, no, the exact amount of what each manager received in the various companies.

Q. I am not asking you for any particular example, but were you generally familiar with the wages paid for such a job? A. Yes.

Q. Will you state to the court, please, what those wages were, or the bracket was, from your experience and knowledge of the subject?

Mr. Aldwell: I object to that, your Honor, on the same grounds I objected to a lot of this type of testimony. Still no foundation has been laid.

The Court: Unless you lay some kind of foundation, I think the objection is good, Counsel.

Mr. Partridge: The difficulties of proof in a matter of this sort are, of course, apparent to your Honor. I realize that is not your Honor's problem, but mine.

The Court: I suppose you could get some executive of some [74] steamship company who could have a familiarity with that subject, a man or woman who would have experience would be able to answer a question like that on the basis of knowledge of what is required, but I do not think I should endeavor to decide this case on the basis of what some former employee of this company said he heard at the time what people were getting in certain jobs in other companies, because that is the worst kind of hearsay.

Mr. Partridge: Isn't that, however, essentially the foundation of any testimony you could get on

(Testimony of James A. McManus.)

the subject unless you approached this problem individually as to each man on a comparable job?

The Court: I think you can produce those who are familiar with this matter. You might even bring reports. You might even be able to demonstrate that in some way without a witness. However, I am up here and not down there. I just do not feel that it is proper for the court to accept what is obviously hearsay testimony.

Mr. Partridge: For the purpose of the record, I will just ask this second question in the face of your Honor's ruling.

Q. Will you tell the court, please, what, in your opinion, was and is the reasonable value of the services of Mr. Pierson rendered to the De La Rama Steamship Company over the period that you were associated with that company in his capacity as Pacific Coast Manager, and before you answer that counsel [75] will undoubtedly want to introduce an objection.

Mr. Aldwell: I object to that for the same reasons we have been making all along, your Honor.

The Court: I am of the opinion that so far as has been developed, this witness is not qualified to give an expert opinion on that. I will sustain the objection.

Mr. Partridge: Very well, you may cross-examine.

Mr. Aldwell: No questions.

Mr. Partridge: That is all, thank you. May Mr. McManus be excused now?

The Court: Very well.

Mr. Partridge: May it be stipulated, Counsel, that copies of letters purporting to be addressed to the Treasury Department, Bureau of Internal Revenue, respectively on the dates June 18th or 19th, 1943, August 10, 1943 and March 16, 1944 are in fact copies of such communications which were sent to the addressee by the company under its authority granted to Mr. H. S. Pierson?

Mr. Aldwell: So stipulated, with the exception of the pencil notations on the last-mentioned letter.

Mr. Partridge: Yes.

Mr. Aldwell: I do not know what they mean.

Mr. Partridge: I will offer the letter of June 18, 1943 in evidence, if it please your Honor, and subsequently I offer the letter of August 10, 1943, and next the letter of [76] March 16, 1944, and ask permission of your Honor to read them at this time.

(The documents referred to were thereupon received in evidence and were respectively marked Plaintiff's Exhibits 2, 3, and 4.)

PLAINTIFF'S EXHIBIT No. 2

"June 18th, 1943

Treasury Department
Bureau of Internal Revenue
Salary Stabilization Unit
100 McAllister Street
San Francisco, California

Attention: Deputy Commissioner

Gentlemen:

We are making an appeal to you as to the decision rendered by the Regional Head of Salary Stabilization Unit in his letter to us of June 7th, PD-2, in reference to our application of April 8th (not April 9th as he mentions in his letter) for certain salary increases.

After reviewing his refusal of our application, it seems to be based on lack of sufficient evidence as to our operations so we are attaching herewith a schedule showing the number of steamers handled by us per month during 1941, 1942 and the first five months of 1943.

In explanation of this schedule we want to bring out that in 1941 we had vessels arriving from the Orient at Los Angeles where they discharged from 300 to 500 tons of cargo and then proceeded to the Atlantic Coast, [77] and on their westbound voyage they arrived at Los Angeles and loaded possibly 400 to 600 tons of cargo then proceeding to San Francisco where they would load an average of from 1000 to 1500 tons of cargo, and we would

produce only a small amount of green supplies to be put aboard ships. Starting in 1942 the situation changed considerably because we started taking delivery of vessels from the shipyards and they have to be manned, provisioned, fueled and alterations made; and when a vessel returns after completing a voyage, it is a case of paying off the crew, remanning, reprovisioning and attending to voyage repairs as well as drydocking when necessary. In other words, in 1941 it was a case of booking a number of tons of cargo, and in 1942 and 1943 we have had the complete operation of the vessels, which naturally is a greater responsibility and entails considerable more labor.

We now have to request some additional increases because of the greater number of steamers we are handling, which necessitates increasing our force. At the same time we have made some changes in our organization, as follows: (1) J. O. McManus, Port Superintendent, has been made the Assistant Operating Manager at San Francisco, and we wish to cancel our previous request for him and now increase his salary from $4200 per year to $4950 per year; (2) E. J. Hult, Chief Clerk at $2700 per [78] year, has been promoted to Assistant Purchasing Agent and we want to increase his salary to $3190 per year; (3) H. K. Fox, Bookkeeper, has been promoted to Assistant Accountant, and we want to increase his salary from $3000 a year to $3300 a year.

Our requests in our previous application, as well as the last two persons mentioned above, make up

the executive and administrative employees of our organization.

You can see from the accompanying chart showing the number of steamers handled in the ports of San Francisco and Los Angeles that in the first five months of 1943 we have handled almost as many vessels as we did in all of the year 1942. Furthermore, in comparing our salaries with other steamship companies, we feel it is absolutely necessary that you grant these increases to hold our force together because on a competitive basis other steamship lines could offer our employees similar positions they now hold and pay them higher salaries as their standards of pay are higher than ours.

If there is any further information required, kindly advise us, in fact, the writer would appreciate it if a conference could be arranged with you to discuss the entire situation and possibly clear up points that may not be included in this appeal.

Yours very truly,

THE DE LA RAMA STEAMSHIP CO., INC.

H. H. PIERSON.

HHP:JK Encl" [79]

STEAMERS HANDLED BY THE DE LA RAMA STEAMSHIP CO., INC., IN SAN FRANCISCO AND LOS ANGELES

	1941		1942		1943	
	San Francisco	Los Angeles	San Francisco	Los Angeles	San Francisco	Los Angeles
January	2	5	2	2	4	1
February	2	4	1	2	4	4

	1941		1942		1943	
	San Francisco	Los Angeles	San Francisco	Los Angeles	San Francisco	Los Angeles
March	2	2	4	1	4	
April	2	5	4	3	8	3
May		1	2	2	11	9
June	3	5	5	1		
July	2	3	2	3		
August	1	4	2			
September		1	1	2		
October	2	4	3	1		
November	2	1	2	2		
December	1	2	2	1		
Totals	19	37	30	20	31	17

[Printer's Note: The above table was attached to Plaintiff's Exhibit No. 2.]

PLAINTIFF'S EXHIBIT No. 3

"August 10th, 1943

Treasury Department
Bureau of Internal Revenue
Salary Stabilization Unit
100 McAllister Street
San Francisco, California

Gentlemen:

In reference to our letter of April 8th also June 18th, we wish to give you the additional information requested, and think we should begin by reviewing each individual separately.

As we stated before, this corporation started in business in the United States on July 1st, 1940, therefore in question No. 8 of the application form we will have to use that date instead of January 1st, 1940.

H. H. Pierson: Salary on July 1st, 1940, was $7200 per year. He has had no increase since that

date and our request now is to increase him, effective April 1st, 1943, to $8500 per year. The reason for this request is that he has had no increase since July 1st, 1940, and on March 1st, 1942, he assumed the duties of his superior, the Assistant General Agent, who joined the Army Transport Service, and carried on that position as well as his position as Pacific Coast Manager. The increase requested does not bring his salary up to the salary that was paid the Assistant General Agent.

Harold Norton: Salary on July 1st, 1940, was $3300 [80] per year, increased on October 1st, 1941, to $3600 per year, and we are now requesting, effective April 1st, 1943, to increase his salary to $4390 per year (our first application showed $4280, which is in error). This is the increase that is due him based on the firm's usual procedure of making yearly increases.

E. J. Hult: Salary on July 1st, 1940, was $1860 per year, was increased on May 1st, 1941, to $2100 per year, and October 1st, 1941, to $2700. We are now asking for permission to increase him, effective April 1st, 1943, to $3190 per year. This is also based on the firm's usual procedure of yearly increases, also because of his increased duties from being promoted from the position of Chief Clerk to Assistant Purchasing Agent.

H. Middleton (Los Angeles Office): On July 1st, 1940, was receiving $4500 per year, increased on October 1st, 1941 to $4800. We are now asking permission to increase him, effective April 1st, 1943, to $6000 per year, based on the firm's policy

of yearly increases as well as his recent promotion from the position of Los Angeles Manager to Assistant Pacific Coast Manager.

J. O. McManus: His employment with the firm started December 1st, 1941, at $3000 per year, as Assistant to the Dock Superintendent. He was promoted to Dock [81] Superintendent. He was promoted to Dock Superintendent on October 1st, 1942, and his salary increased to $4200 per year. We have now promoted him to the position of Assistant Operating Manager and request that we be permitted to increase his salary, effective April 1st, 1943, to $4950 per year.

H. J. Burns: He started with the firm in San Francisco on December 15th, 1941 at $4200 per year, and we request permission to increase his salary, effective April 1st, 1943, to $4950 per year. Mr. Burns is Pacific Coast Accountant and we feel the increase is due him under the firm's policy of yearly increases, plus his present increased responsibilities.

As regards our previous request for increase for H. K. Fox, we wish you would withdraw that request.

To give you more information in regards to our increased business, we wish to state that on the schedule of steamers handled by us, which we previously forwarded to you, you can enter June, 1943, we handled nine vessels in San Francisco, ten vessels at Los Angeles, and in the month of July, six in San Francisco and three at Los Angeles. The figures tabulated show that for the first

six months of 1943 we have done 30 percent more business than we did in the entire year of 1942, and with the prospects of our business increasing even more than in the first six months, [82] we will do better than 160 percent greater business in the year 1943 than we did in 1942.

In addition to the increase of business taking in consideration the number of vessels concerned, we want to bring to your attention that in the present operations, which you know is done for account of the U. S. Government, the labor in connection with the handling of vessels has increased at least five times to what it was prior. This is caused by the war conditions, and the numerous reports requested by the War Shipping Administrator, whom we work directly under, and the Army, Navy and Coast Guard. As an example today in bunkering a ship, which ordinarily would take one operation of contacting the fuel oil company, we now have to contact the fuel company, plus the Army or Navy, whichever is involved. In signing on a crew, before it was a case of getting the Shipping Commissioner and signing the crew on—now in addition to the Shipping Commissioner we have to make out crew reports and submit them to the Army, Navy and Coast Guard, which is something we never had to do before. In connection with the purchasing of merchandise, we must get the necessary signatures on invoices and forms filled out as requested by the Government, which takes almost double the time it did in the past.

From the above you can see that with the in-

creased [83] business and responsibilities, and our competitive situation in the labor market of the steamship fraternity, our employees are entitled to these increases. In addition, the firm finds they have to make these increases in order to hold the employees, and know if you will check our scale of wages against those paid by other steamship companies, you will find they are below the salaries paid by other steamship companies for similar positions. Also, the majority of the steamship fraternity have been paying anywhere from 10 to 15 percent high cost of living increases over their basic salaries, which are higher than ours, so when you take this into consideration, our employees are entitled to the same thing. In our request for increases in most cases we are only giving this high cost of living increases, which we feel the employees should have in addition to the increases other steamship companies have granted. However, we know that being a smaller institution we cannot meet the salaries being paid by other larger steamship companies.

We want to officially notify you at this time that we went on a 48-hour week schedule effective June 16th, 1943, at the request of the War Manpower Commission, and we have just been granted permission by our main office in New York to ask for the following scale of increases to take care of the additional eight hours per week that the employees are working. On salaries $2400 per year [84] or less, we are paying 30 percent to take care of the time and a half for the additional eight hours, and on salaries from $2401 to $3000 per

year, we are asking permission to pay 20 percent to take care of the additional eight hours, and above $3001 per year we request permission to pay $600 per year to cover the additional eight hours.

If there is any further information desired we shall be glad to furnish same. Hoping that you will give this your immediate attention and favor us with a prompt reply, we remain,

Yours very truly,

THE DE LA RAMA STEAMSHIP CO., INC.

H. H. PIERSON."

HHP;JK

PLAINTIFF'S EXHIBIT No. 4

"March 16th, 1945

Salary Stabilization Unit
Treasury Department
Bureau of Internal Revenue
Balboa Building, 593 Market Street
San Francisco 5, California

Attention: Mr. Milo W. Bean

Gentlemen:

We are attaching form SSU-1 requesting salary adjustments and would appreciate it if you would approve these adjustments retroactive to March 1st, 1945.

We base these increases on increased business, parity [85] of similar positions of other steamship

lines and salaries required for replacement of necessary.

In 1941 we owned three motor vessels of our own, and on March 1st, 1945, we have two motor vessels of our own and eighteen steamers allocated to us to operate as General Agents for the U. S. Government, War Shipping Administration. In addition, we act as sub-agent for the Pacific-Atlantic Steamship Co. of Vancouver, Washington, States Marine Corporation of New York and R. A. Nicol & Co., Inc., New York, and these three companies are General Agents for the U. S. Government, War Shipping Administration. We handled in California Ports in 1941, 21 steamers; in 1942, 54 steamers; in 1943, 144 steamers; in 1944, 149 steamers; and the outlook for 1945 is that we will handle more vessels than in 1944.

Our cash disbursements for 1941 were $1,495,790; in 1942, $1,766,005; in 1943, $2,955,007; and in 1944, $4,389,323; which shows a healthy increase each year. In addition, the number of our employees has increased since January, 1941, from 11 to 30 at the present time.

Anticipating a prompt reply, we remain,

Yours very truly,

THE DE LA RAMA STEAMSHIP CO., INC.

H. H. PIERSON,
Pacific Coast Manager."

HHP:jk Encl. [86]

Mr. Partridge: Now, has the original deposition of Mr. Suewer been returned to the clerk of this court?

The Clerk: It is on file, yes.

Mr. Partridge: I would like to offer that in evidence on behalf of the plaintiff, if it please the court.

The Court: I glanced through it at the noon recess, so I would be familiar with any matters counsel might want to bring up in connection with the matter.

Mr. Partridge: Yes, it was not my intention to impose a reading of it upon the court.

The Court: Who took the deposition?

Mr. Aldwell: We did, your Honor.

The Court: I suppose you have no objection to the deposition?

Mr. Aldwell: No, none at all, except we were going to put it in, ourselves. We had some objections to some of the questions on cross-examination, however.

The Court: Why don't you consider the deposition having been read, except those objections, and then I will rule on them if you wish, either now or at some later time, whatever way counsel wishes to handle the matter.

Mr. Partridge: That would seem to be most expeditious. It may be deemed offered in evidence subject to any objections either one of us might make, on which the court will rule in an orderly procedure. [87]

The Court: You can make a list of them, either

now or at a later time, and we will just go over the objections and then it will not be necessary for you to read the whole deposition.

Mr. Aldwell: That is satisfactory, your Honor.

The Court: Is that all right?

Mr. Partridge: Yes, your Honor.

Mr. Aldwell: Before you go any further, Mr. Partridge, I would like to clear up one thing with respect to that last exhibit you read. There was a statement about 144 to 149 vessels. The court may get the impression that means entirely different ships. Actually, what it means is that there were 144 vessels handled over the course of the year. They may be the same vessel two or three times.

Mr. Partridge: That is right. A ship would come in three or four times.

Mr. Aldwell: In view of the previous testimony with respect to 21 vessels, I did not want the court to get the impression that they had a terrific increase.

Mr. Partridge: The only parts of the deposition that I want to remind the court of at this time are these simply, your Honor: The comparative salaries of the so-called key men and the bonuses granted to each—

The Court: I read that part of the deposition. Who is Griffin? That was unclear to me. [88]

Mr. Aldwell: Griffin was the assistant to Mr. Suewer in New York.

The Court: Oh, he was a New York man?

Mr. Aldwell: That is right.

The Court: Bradford was the assistant to the manager who was out here?

Mr. Aldwell: Yes. Mr. Bradford was with the company only a short time.

The Court: I just wanted to get these names clear in my mind. McManus, who testified here, was the assistant in San Francisco under Mr. Pierson, and then the other gentleman in Los Angeles, Middleton—those are the names that were mentioned in connection with those salaries and bonuses?

Mr. Aldwell: I think the hierarchy went something like this: Suewer, Griffin, Pierson, Middleton, McManus.

The Court: Of course, there was a man out here, too, for a while, you said.

Mr. Aldwell: That was Bradford.

The Court: He was higher than Pierson.

Mr. Aldwell: Oh, yes.

The Court: But that was only for a short period of time.

Mr. Aldwell: He left in the beginning of 1942.

The Court: Griffin was the assistant in New York.

Mr. Aldwell: That is right.

Mr. Partridge: Counsel will correct me if I am wrong [89] but in order to straighten out Bradford and Griffin in your Honor's mind, it is my understanding Bradford and Griffin really had the same job, one succeeded the other, but Bradford, it happened, was stationed in San Francisco, and he went over in the Services and he was replaced by Grif-

fin, who was stationed in New York. Is that not correct?

Mr. Aldwell: I do not know the answer to that, myself. I am just asking Mr. Middleton, here, whether he can throw any light on it.

Mr. Partridge: Would your Honor care to hear more brief testimony from Mr. Pierson on that?

The Court: I thought you would like to clear that up.

Mr. Partridge: Yes, I would.

HERMAN H. PIERSON,

recalled as a witness, and having been previously sworn, testified as follows:

Direct Examination

Mr. Partridge: Q. Mr. Pierson, was Mr. Bradford employed by the defendant during the time you were there?

A. The De La Rama Steamship Corporation.

Q. What was his job?

A. He was the No. 2 man in the United States.

Q. Was that while Mr. Griffin was with the company, or not?

A. Mr. Griffin was with the company in New York. [90]

Q. Then there was Mr. Suewer, who was in charge, Mr. Bradford, who was No. 2 man, and he was located where?

A. In San Francisco.

Q. Was he your superior? A. He was.

Q. Was he the Assistant United States Man-

(Testimony of Herman H. Pierson.)

ager referred to in the letter addressed to the Salary Stabilization Unit? A. Correct.

Q. Who went into the Transport Service?

A. That is right.

Q. When did he go into the Transport Service?

A. February, 1942.

Q. Did anyone replace him in this area?

A. Nobody replaced him.

Q. Who took over his duties? A. I did.

Q. Was Mr. Griffin at all times stationed in New York? A. Correct.

Q. Was he inferior to Mr. Bradford while Mr. Bradford was with the company?

A. That was my impression, that Mr. Bradford was No. 2 man, Mr. Griffin would be No. 3 man, or assistant to the No. 1 man in New York.

Q. And who would be the No. 4 man?

A. That would be myself. [91]

The Court: Q. You say Mr. Bradford left in February, 1942. How long had he been there?

A. Came in I think March or April, 1941.

Q. He was less than a year in San Francisco?

A. That is right.

Mr. Partridge: Q. Mr. Griffin was promoted, so to speak, to No. 2 man?

A. That is right. There was nobody who replaced him. Bradford was never replaced on the Pacific Coast.

Q. What about the comparative volume of traffic on the Pacific Coast and on the East Coast? Did one have more than the other, were they equal, or what was the situation?

(Testimony of Herman H. Pierson.)

A. We handled more steamers on the Pacific Coast than they did on the Atlantic Coast.

Mr. Partridge: You may cross-examine.

Cross Examination

Mr. Aldwell: Q. When Mr. Bradford came here, he came from the Philippines, did he not?

A. Yes, sir.

Q. He was sent over by the home office in Manila? A. That is right.

Q. He was stationed here in San Francisco all the time, wasn't he? A. Correct.

Q. As you testified, he was No. 2 man in the United States? [92] A. That is right.

Q. What effect did that have on your position there?

A. I just carried on as Pacific Coast Manager under him.

Q. In other words, he directed your activities?

A. That is right.

Q. You sort of got pushed down one notch, and when he left you went back up a notch, is that right? A. That is right.

Q. When Mr. Bradford left, that left Mr. Griffin as No. 2 man? A. That is right.

Q. And, of course, the New York office was always over the Pacific Coast offices?

A. Correct.

Q. And everything you did you were subject to direction and veto, or what have you, from Mr. Suewer or Mr. Griffin? A. That is right.

Mr. Aldwell: That is all.

Mr. Partridge: That is all. Do you waive any objection to the photostatic copy?

Mr. Aldwell: Well, I waive any objection, yes.

Mr. Partridge: I will offer in evidence, your Honor, a photostatic copy of a document which purports to be a certificate of resolution of the De La Rama Steamship Company, adopted at a special meeting of the Board of Directors held [93] in the Philippine Islands upon the 7th day of July, 1940, according to its terms. There are some certifications by the secretary that are attached, but the meat of it is in the resolution, itself. The resolution confers upon Mr. R. F. Suewer, or his substitutes, all powers granted previously to him under a resolution of July 1, 1940, confirms them and ratifies them, and I think may be fairly construed to provide that in the event of the outbreak of war, Mr. Suewer is constituted the sole agent and attorney in fact for the company, to use the language of the document, "* * * he is hereby authorized to operate, conduct, manage, charter, rent, hire, and in anywise handle the vessels of the corporation which may be found within the territorial waters of the United States or its possessions, or within the reliable reach of the U.S.A. firm's organization, to sail, enter, and clear the said vessels upon their voyages inside the territorial waters of the United States or its possessions, or to foreign countries; to make and enter into any and all agreements, contracts, arrangements, relative to the operation of the said vessels, to the maintenance, conservation and repair of same, to

the manning of said vessels, to the transportation of cargo and/or passengers on board the same, to sell, transfer, or convey the said vessels and/or change their registry if necessary, and deposit the proceeds thereof on behalf of the corporation; to collect, receive, demand, recover and receipt for any and all moneys [94] due, owing, payable for or on account of the said vessels, their operation or management," and it goes on and recites that should conditions arise wherein the attorney-in-fact would be unable to communicate with the officers of the corporation, he can sign checks, and, I think we can fairly state, do just about anything the company would do.

The Court: You say he has a right to hire help and that sort of thing? Is that specifically mentioned?

Mr. Partridge: No, it is not specifically mentioned.

The Court: Of course, he had the power to hire crews of ships.

Mr. Partridge: I think when the time arrives for argument in this case it can be shown the power-of-attorney conferred that, but in answer to your Honor's question, it does not specifically mention it. I will offer this.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 5.)

PLAINTIFF'S EXHIBIT No. 5
The De La Rama Steamship Co., Inc.
City of Iloilo, Philippines

CERTIFICATE OF RESOLUTION

Know All Men By These Presents:

That I, Eliseo Hervas, Secretary of The De La Rama Steamship Company, Inc., a corporation organized and existing under the laws of the Commonwealth of the Philippines, do hereby certify that at a special meeting of the Board of Directors of the said corporation, held at the City of Iloilo, Province of Iloilo, Philippines, on the seventh day of July, 1940, at which a quorum was present, a resolution of the following tenor was approved:

"Resolved, that all the powers conferred on Mr. R. F. Suewer or his substitutes under the Resolution of July 1, 1940, are hereby confirmed and ratified in so far as the said powers are not in conflict or inconsistent with the powers herein conferred.

Resolved, further, that in case Mr. R. F. Suewer should decide to dismiss the accountant of the New York Office whom he is authorized to appoint under the Resolution of July 1, 1940, and the corresponding approval of the appointment of a new accountant may not be obtained from the principal office of the corporation in the Philippines, the corresponding power of nominating or appointing a new accountant shall be vested in Mr. Foley or his substitute or substitutes as herein provided.

Should it become necessary for Mr. R. F. Suewer or his substitutes, as hereinafter provided, to open overdraft accounts or obtain banking facilities in excess of any amount that may have been previously prescribed by the principal office of the corporation in the Philippines or under the limitations imposed in the Resolution of July 1, 1940, and should it be impossible by all means to communicate with the principal office in the Philippines for the purpose of securing approval either for the opening of such overdraft account or for obtaining banking facilities in excess of the amount already previously prescribed, then such approval may be given by Mr. Foley or his substitute as herein provided.

In case Mr. R. F. Suewer or his substitutes, as hereinafter provided, should not be able to communicate with the principal office of the corporation in the Philippines due to the then prevailing conditions, he is hereby authorized to operate, conduct, manage, charter, rent, hire, and in any wise handle the vessels of the corporation which may be found within the territorial waters of the United States or its possessions, or within the reliable reach of the U.S.A. firm's organization, to sail, enter, and clear the said vessels upon their voyages inside the territorial waters of the United States or its possessions or to foreign countries; to make and enter into any and all agreements, contracts, arrangements, relative to the operation of the said vessels, to the maintenance, conservation and repair of the same, to the manning of said vessels, to the

transportation of cargo and/or passengers on board the same, to sell, transfer, or convey the said vessels and/or change their registry if necessary, and deposit the proceeds thereof on behalf of the corporation; to collect, receive, demand, recover and receipt for any and all moneys due, owing, payable for or on account of the said vessels, their operation or management.

Should conditions arise whereby communication with the principal office of the corporation in the Philippines is rendered impossible or unreliable, and it should be necessary for Mr. R. F. Suewer to draw against Account No. 2 with the Marine Midland Trust Co., New York, Mr. R. F. Suewer shall obtain the concurrence of Mr. Foley or his substitute as herein provided for the counter-signature of the check or checks, the said Mr. Foley or his successor being fully authorized to pass upon the merits of each and all withdrawals before granting his counter-signature on the check or checks.

In case of death or incapacity, legal or otherwise, of Mr. R. F. Suewer, and communication with the main office of the corporation in the Philippines is rendered impossible or unreliable due to the then existing or prevailing conditions, the powers herein conferred and those conferred on Mr. R. F. Suewer under the Resolution of June 1, 1940, in so far as they may not be inconsistent with this resolution, shall be vested in a successor or successors to be nominated by the then incumbent of the position of President of Messrs. Macleod & Co., Inc., New

York. In case of death or incapacity, legal or otherwise, of Mr. Foley, and communication with the Philippines is rendered impossible or unreliable due to the then prevailing conditions, the powers now conferred on him as well as those conferred on him in the resolution of June 1, 1940, shall be vested in his successor or successors as Manager of the Philippine National Bank, New York, or in default thereof in the incumbent of the office of Philippine Resident Commissioner in Washington, D. C.

The original of this resolution shall be held in escrow by the Philippine National Bank of New York, and shall be released by Mr. Foley or his successor or by the Philippine Resident Commissioner in Washington, D. C., as the case may be, only when the conditions and circumstances contemplated herein should arise, that is, that the United States and/or the Philippines become involved in any international conflict and/or communication with the Philippines is rendered impossible or unreliable, and shall be exercised by Mr. R. F. Suewer or his substitutes only upon delivery unto him or his substitutes of the original of this resolution.

Hereby giving and granting to said R. F. Suewer or his substitutes full and ample power and authority to do and perform all acts and things reasonably necessary or proper for the due carrying out of the said powers according to the true tenor and purport of the same, to the same legal and binding effect as the corporation might or could do under and by virtue of these presents,

and hereby confirming and ratifying all that the said R. F. Suewer or his substitutes may lawfully do or cause to be done under and by virtue of these presents."

In Witness Whereof, I have hereunto set my hand and caused the seal of the corporation to be affixed at the City of Iloilo, Province of Iloilo, Philippines, this 11th day of July, 1940.

ELISEO HERVAS,
Secretary, The De La Rama Steamship Company, Inc.

United States of America,
Commonwealth of the Philippines,
Province of Iloilo, City of Iloilo—ss.

Eliseo Hervas, being first duly sworn, deposes and says:

I am the Secretary of the corporation known as The De La Rama Steamship Company, Inc., and in my capacity as such Secretary signed the foregoing certificate and sealed it with the seal of the said corporation; I have read the contents of the said certificate and the facts therein stated are true and correct of my own knowledge.

ELISEO HERVAS,
Secretary, The De La Rama Steamship Company, Inc.

In the City of Iloilo, Province of Iloilo, Philippines, on this 11th day of July, 1940, before me, a Notary Public for and in the Province of Iloilo

personally appeared Mr. Eliseo Hervas, in his capacity as Secretary of The De La Rama Steamship Co., Inc., and made oath to me that the foregoing is a true and correct copy of the resolution approved by the Board of Directors of the said company on the seventh day of July, 1940, and acknowledged to me that the foregoing certification is his fee and voluntary act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal at the place and date first hereinabove written.

/s/ TOMAS CONCEPCION,
Notary Public.

Until December 31, 1940.

Doc. No. 132. Page No. 36. Book No. XI. Series of 1940.

Court of First Instance, Province of Iloilo,
7th Judicial District

City of Iloilo
Province of Iloilo
Commonwealth of the Philippines

I, Juan Jamora, Clerk of the Court of First Instance, 7th Judicial District, Province of Iloilo, Commonwealth of the Philippines, do hereby certify that Attorney-at-Law Mr. Tomas Concepcion, who signed the annexed instrument, was, at the time of so doing, a Notary Public in and for the said province, duly commissioned and sworn, according to the laws of this Country; that I am

acquainted with his handwriting, and that his signature to the annexed instrument is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court, this 11th day of July, 1940, A. D.

JUAN JAMORA,
Clerk of Court of First Instance, 7th Judicial District, Province of Iloilo.

This is to certify that Mr. Juan Jamora is the Clerk of Court of First Instance, 7th Judicial District, Province of Iloilo, Commonwealth of the Philippines; that his signature above appearing is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court, this 11th day of July, 1940, A. D.

CONRADO BARRIOS,
Judge.

Court of 1st Instance of Iloilo, Province of Iloilo, 7th Judicial District.

Office of the President of the Philippines

United States of America,
Commonwealth of the Philippines,
City of Manila—ss.

I, Jorge B. Vargas, Secretary to the President of the Philippines, do hereby certify that Conrado Barrios, whose name appears signed to the attached certificate, was at the time of signing the

said certificate, Judge of First Instance, Iloilo, Philippines, duly appointed and qualified and was, as such official, duly authoriezd by the laws of the Philippines to sign, the same, and that the full faith and credit are and ought to be given to his official acts; and I Further Certify that I am well acquainted with his handwriting and verily believe the signature and seal affixed to the said certificate are genuine.

In Witness Whereof, I have hereunto set my hand at Manila, Philippines, this 21st day of August, A. D. 1940.

JORGE B. VARGAS,
Secretary to the President.

Mr. Partridge: Your Honor, that is all the evidence I have at this time. I must be candid with the court in saying I am somewhat at a loss in proving the reasonable value of these services. I feel upon a construction of Mr. Pierson's testimony and the nature and extent of the activities of Mr. Suewer, the tentative testimony before your Honor on reasonable value, which is subject to a motion to strike, the marked comparison between the bonus and salaries of Mr. Suewer [95] and Mr. Pierson, the fact that similar bonuses were paid to inferiors to Mr. Pierson, the law of the case, there is a great deal of merit to Mr. Pierson's contention that he is entitled to the fair value of his services, and for that reason I ask permission of this court

to adjourn until the next convenient time of the court in an effort to be prepared to prove within the rulings of your Honor such testimony as will have a bearing or will be of assistance to your Honor in reaching a just conclusion on that subject.

The Court: Have you some evidence to put on this afternoon?

Mr. Aldwell: No, your Honor, I have not.

The Court: What did you want to produce further? Some testimony by some experts as to what the reasonable value of the services of the Pacific Coast Manager of some comparable steamship company is?

Mr. Partridge: Yes, your Honor. Of course, there is evidence in this record from which your Honor could reach a conclusion without additional testimony.

The Court: Of course, on the testimony that the plaintiff has offered, assuming there is a binding agreement here, I think the plaintiff would be entitled to something more than he got, but as I have heard the whole case, gentlemen, it is a question of fact as to what the nature of this agreement, if there was an agreement, was. Assuming there was a binding agreement, to pay at the conclusion of the war, an additional amount to [96] represent what might be said to be the proper comparative value of the plaintiff's services, he might be entitled to something more than the $2500 he got. He would be in a very difficult twilight zone there because it might be $500 more, or $1000 more, or a few thousand dollars more, and it would be very

difficult to arrive at a figure in that regard because of the difficulty that the court would have in trying to figure out just what kind of a job he had, how much it was reasonably worth, and I think I would have to go down and watch the operations of this company for a while before I would be in a position to determine that. It is a subject that would be most difficult to cover by expert testimony.

(Discussion.)

The Court: Suppose we take a brief recess, and each of you give your ideas about the theory of the liability in this case.

(Recess.)

Mr. Aldwell: Your Honor, during the recess Mr. Partridge and I discussed the possibility of settlement, and we have reached a tentative agreement on the figure. It is now too late in New York to get hold of Mr. Suewer on the phone. He would have to approve it, of course. I do not know whether he would agree to settle, but our suggestion is that we suspend operations at this point and continue it to a date satisfactory to your Honor, and if we do not reach a settlement, [97] proceed at that point.

The Court: That is perfectly agreeable to the court. What time would you suggest with reference to another date? How long would it take you?

Mr. Aldwell: We will get him on the phone the first thing in the morning.

The Court: Would you want to put it over temporarily to Monday?

Mr. Partridge: That would be convenient.

The Court: If you are going to have to have a further hearing in the matter, I would rather go ahead with it sometime on Monday, because of the jury trials coming along. Will that be agreeable?

Mr. Partridge: That will be agreeable.

The Court: Suppose we continue the matter until 11 o'clock Monday morning?

Mr. Aldwell: Very well, your Honor.

The Court: If you dispose of the matter among yourselves, notify the clerk.

Mr. Partridge: As soon as we know we will let the clerk know so your Honor can adjust the calendar.

(An adjournment was thereupon taken until Monday, November 10, 1947, at 11 o'clock a.m.)

Monday, November 10, 1947,
11:00 o'clock a.m.

The Clerk: Pierson vs. De La Rama Steamship Company.

Mr. Partridge: Your Honor, I might say our efforts to settle were unsuccessful.

The Court: Has the plaintiff finished his case now, or is there some more evidence to be presented?

Mr. Partridge: I will ask permission to recall Mr. Pierson to the stand for some additional evidence; likewise, permission of this court to file, for such assistance as it may serve, a trial memorandum dealing with the problems of proof that we are into, and which has been rather hastily gotten up. Before I call Mr. Pierson I would like

to make these statements to your Honor: First, Mr. Suewer has seen fit to refuse to pay anything in settlement of this case, at all. Second, it will appear from the memorandum there was authority in the State of California in two cases, at least, cited there, including a very late one, that the plaintiff, himself, is perfectly competent to testify as to the value of his services.

The Court: I do not think there is any doubt about that.

Mr. Partridge: It was my understanding, your Honor, that your Honor sustained an objection to a question addressed to him in that regard the other day.

The Court: I do not recall that. I recall that you asked the other witnesses who were here how much the value of the [99] plaintiff's services was, but I do not recall your asking that question of the plaintiff, himself.

Mr. Partridge: Be that as it may, I would like permission to recall him for that purpose.

HERMAN H. PIERSON,

the plaintiff herein, was recalled as a witness, and having been previously duly sworn, testified as follows:

Direct Examination

Mr. Partridge: Q. Mr. Pierson, having in mind your experience in the steamship business, as you recited under oath in this court, do you have an opinion as to the reasonable value of the services performed by you for your steamship company during the war period?

(Testimony of Herman H. Pierson.)

A. You mean you want me to tell what my ideas—

Q. I want to know whether or not you have an opinion on the subject. Do you, "Yes" or "No"? A. Yes, I have.

Q. Will you state to the court what, in your opinion, the reasonable value of your services performed was or is?

A. I think a minimum of a thousand dollars a month.

Mr. Partridge: You may cross-examine.

Cross-Examination

Mr. Aldwell: Q. Do you consider that $1000 a month for each and every month of the war period to August 14, 1945? [100] A. Yes, sir.

Mr. Aldwell: No further questions.

Mr. Partridge: I think we have agreed to stipulate, as far as the plaintiff is concerned, and in behalf of the defendant the following figures are available with respect to salaries actually paid and a salary calculated at the rate of $1000 a month, the amounts of money received by Mr. Pierson for the period December 7, 1941 to August 14, 1945, total $34,574.81. That, I should add, includes regular bonuses, the $2500 bonus and his salary; and at the rate of $1000 per month, which is the amount sought in the complaint, the total which would have been paid to Mr. Pierson for that same period is $45,350. You will stipulate that we have reached that figure together, Mr. Aldwell?

Mr. Aldwell: So stipulated.

Mr. Partridge: I at this time, and in light of

the cases contained in the memorandum before your Honor, move that your Honor's order vacating that portion of the testimony of Mr. Parkinson relating to a salary bracket for this job be set aside and that the testimony in that regard be considered as part of the record in this case. I think that after your Honor has examined the authorities cited, your Honor will find that anyone familiar with the steamship business or allied business is qualified to give an estimate as to his opinion of the value of the services. [101]

The Court: I will take the motion under advisement and decide it when I decide the case.

Mr. Partridge: And now we rest.

Mr. Aldwell: I was, if your Honor please, going to make a motion to dismiss, but I think probably I would have to repeat some of the arguments I was going to use, so I think I shall put on the defendant's case and then argue the whole thing at the end of that. I think it will expedite matters. Before doing so, there are one or two motions I want to make.

First, in regard to Mr. Parkinson's testimony, as Mr. Partridge has just stated, some of that was stricken out on my motion in view of his declining to answer certain questions on cross-examination. I just wanted to get it clear in my own mind as to what was stricken out. Your Honor will recall that he testified on direct examination, 1, a minimum salary should be $12,000 year, and later he also fixed a bracket of $10,000 to $15,000. Assuming the motion to strike is granted, I take it that

means both phases of his testimony are stricken out.

Mr. Partridge: I am sure, your Honor, that the record will reveal only the last portion of the testimony was stricken out, that the opinion of Mr. Parkinson as to the reasonable value of the services of Mr. Pierson remains in the record.

Mr. Aldwell: That was admitted subject to a motion to strike, as I recall, at the time. [102]

Mr. Partridge: Yes.

The Court: I will consider the whole matter of the motion to strike this testimony in its entirety on my determination of the case. I will either redecide that question or the decision itself will indicate whether or not I will give credence to that testimony.

Mr. Aldwell: The plaintiff introduced in evidence Mr. Suewer's deposition, and at this time I wish to move to exclude from that a certain part of the cross-examination which appears on page 23, starting at line 11, and continuing through page 23, 24, and concluding on line 7 of page 25, in which there was gone into the question of Mr. Suewer's own compensation. I object to that, if your Honor please, on the ground that that is totally immaterial and irrelevant in connection with the plaintiff's case.

Mr. Partridge: Of course, I am going to make this suggestion, Counsel: I believe his Honor has already made it, that you and I address to this court in writing our respective motions.

Mr. Aldwell: That is the only one I have; as a matter of fact, I did not do it.

I have others, and I think that will save the time of this court.

The Court: I will rule on it right now. There is no use making this case too cumbersome. Page 23 to page 25? [103]

Mr. Aldwell: Stop on page 25 at line 7. That deals with Mr. Bradford's compensation and Mr. Suewer's compensation. In my view it is absolutely immaterial.

The Court: I think I should allow that testimony to stand, counsel, on the theory that it throws some light on the manner in which the defendant was handling the compensation of its employees during the war years.

Mr. Aldwell: Very well, your Honor. That being so, I will proceed with the defendant's case. I believe Mr. Suewer's deposition is already in evidence, but for the sake of the record I will offer it in evidence at this time again on behalf of the defendant.

The Court: Very well.

Mr. Aldwell: I take it your Honor does not want it read in evidence?

The Court: As I stated to you, I read it through during the recess one day. I think it was Friday I read through it. The main issue involved in his deposition was the nature of the compensation of the plaintiff.

Mr. Aldwell: That is correct. At this time also, your Honor, I would like to introduce in evidence portions of the deposition of Mr. Pierson, which was taken by us, and specifically I would like to read them into the record if your Honor will allow

me to do so, because I want to put in a few brief excerpts from it, starting on page 10, line 22:[104]

"Q. Will you state the substance of those discussions you had with Mr. Suewer in February of 1944?

A. He admitted our scale was under steamship companies, and something would have to be done about it, otherwise we were going to make some moves to get some better positions, and he realized at the time it was very difficult to get approvals from the various Government bodies, and he decided that something would have to be done later in the form of taking care of them in some way after the war was over, or when the shooting stopped, anyway, so they could contact the home office. In the discussion I told him that some of our boys were going to move out unless they would get something in the form of increased salaries, in taking care of, especially, the higherups in the operating end of it, including myself. He figured at the time that adjustment could be made to take care of everybody that would come in that category. So we carried on.

Q. Did he at that time make any statement as to his authority to grant salary increases?

A. He had the authority to grant certain increases in salary and pay us the way he did, authorizing us to get increases. He had that authority, but he said he didn't have any authority to grant any bonuses at that time.

Q. What was finally agreed between you as to bonus? [105]

A. He had to take it up with the home office when Manila was liberated and the home office was in operation.

Q. What discussion was had at that time as to the amount of the bonus?

A. There was no actual amount mentioned on it other than what would be considered a fair bonus for the top men that had carried on through the war period at a low salary. There was no actual amount stipulated to.

Q. So he therefore agreed at that time to take the matter up with the people in Manila after Manila was liberated?

A. That's right. Well, he felt, or he asserted that he knew that if he recommended certain increases or bonuses for the boys at work during the war period, he felt positive they would be granted.

Q. But there was no fixing of any amount?

A. No stipulation as to the amount at all, and we trusted the boy."

That concludes that excerpt. One other short excerpt, page 13, line 9:

"Q. Did you have any further discussions on the subject of salary or bonus after that date?

A. The discussion we had was in 1946, February, when he was on his way to Manila, and he promised at that time he would take up the question on the lines that he had [106] promised to, and on his arrival back from Manila in March of 1946, at the Biltmore Hotel, I discussed it with him.

Q. That was the Biltmore Hotel in Los Angeles?

A. Yes, and he said he had discussed it out there with the officials, and that they had approved the plan of paying a bonus to the men that were entitled to a bonus and that he was to work out the ones that were to receive the bonuses and the amounts and submit them to Manila for approval.

Q. Did you at that time or any other time thereafter discuss with him the amount of the bonus he should recommend for you?

A. I never discussed the amount because the way he always expressed it was that it would be a justifiable amount for the services performed."

Those are the only two excerpts from Mr. Pierson's deposition that I wish to offer in evidence at this time.

I wish to offer in evidence at this time a series of cables between New York and Manila, and a certified copy of the resolution of the board of directors, and Mr. Partridge, I believe, has no objection to the introduction.

Mr. Partridge: I have no objection to a better foundation being laid. I waive any formality about their proof. What is the purpose of the offer? [107]

Mr. Aldwell: The main purpose is to give the court the full story here.

Mr. Partridge: I have no objection.

Mr. Aldwell: I offer in evidence a photostatic copy of a cable addressed to Suewer, New York, from Garrett, and ask that that be introduced as Defendants' Exhibit A.

(The document referred to was thereupon received in evidence and marked Defendants' Exhibit A.)

Mr. Aldwell: I also offer in evidence photostatic copy of a radiogram addressed to Garrett, RAMA, Manila, signed Suewer, dated July 8, 1946.

(The document referred to was thereupon received in evidence and marked Defendants' Exhibit B.)

Also a photostatic copy of a cable addressed to Suewer, RAMA, New York, signed Gefrett—I presume that means Garrett, dated July 11, 1946.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Also a certified copy of a resolution of the board of directors of the De La Rama Steamship Company on July 10, 1946, certified by the Assistant Secretary of the Company.

(The document referred to was thereupon received in evidence and marked Defendants' Exhibit D.)

Mr. Aldwell: If your Honor please, certain parts of these cables refer to something else. I think it would help if I [108] just read them into the record.

Exhibit A, dated July 8, 1946, addressed to Suewer, 90 Broad Street, New York, and signed by Garrett.

"Thirty-nine your twenty-two * * * Please advise names five executives for whom bonus proposed and I will discuss with directors meeting next Wednesday. (Signed) Garrett."

Exhibit B, radiogram dated July 8, 1946, addressed to Garrett, RAMA, Manila:

"Thirty-two your thirty-nine * * * (Replying to the one I just read) * * * McManus, Pierson, Middleton, Lowey stop Klee Meridith equal shares of fifth grant. (Signed) Suewer."

Mr. Partridge: Apparently that means they split the $2500 among those three people.

Mr. Aldwell: Yes, they list four and then two others to split fifth grant.

Exhibit C, a cablegram dated July 11, 1946, addressed to Suewer, New York, signed Gefrett:

"Forty board approve total bonus payment twelve thousand five hundred dollars but disapprove additional commission to Bradford."

The Court: Those telegrams passed after Suewer had returned from his visit?

Mr. Aldwell: That is correct, your Honor, yes. This [109] is in July, 1946, and your Honor will recall the bonus check $2500 referred on the voucher there to board of directors' resolution of July 11th. That is the resolution I am now going to read. Reading now from Exhibit D, after reciting who was present at the meeting and so forth:

"The next matter brought before the meeting was the suggestion of Mr. Robert Suewer, manager of the company's interests in the United States, to the effect that the sum of $12,500 be appropriated for a bonus to six (6) deserving minor executives of the New York, San Francisco and Los Angeles offices in consideration of meritorious services rendered by them during the war.

"On motion duly made and seconded, the

following resolution was, thereupon, unanimously approved:

"Resolved, that a special bonus amounting to a total of $12,500 be paid to such minor executives of the New York, San Francisco, and Los Angeles offices, as may be determined by Mr. Robert Suewer, in consideration of meritorious services rendered by them during the period of the war."

HUGH MIDDLETON

was called as a witness on behalf of the defendants, and being first duly sworn testified as follows:

The Clerk: Q. Will you state your name to the court? [110] A. Hugh Middleton.

Direct Examination

Mr. Aldwell: Q. Where do you live, Mr. Middleton?

A. In San Rafael, at the present time.

Q. Are you employed by the defendant, the De La Rama Steamship Company, Inc.?

A. Yes.

Q. How long have you been employed by the defendant? A. Since the spring of 1939.

Q. You were employed by the defendant during the period December 7, 1941 to August 14, 1945?

A. Yes.

Q. In what capacity?

A. District Manager in Los Angeles, and toward the latter part of that period I was assistant Pacific Coast manager with headquarters in Los Angeles.

(Testimony of Hugh Middleton.)

Q. What is your present position?

A. Pacific Coast manager.

Q. In San Francisco?

A. In San Francisco.

Q. You just heard me read certain telegrams referring to certain gentlemen. Would you be good enough to identify these gentlemen and their positions with the De La Rama during the war, excluding Mr. McManus, Mr. Pierson and yourself, with whom the court is already familiar? Who is Mr. Lowey? [111]

A. Mr. Lowey was in our New York office and to the best of my knowledge he was in charge of all auditing and accounting procedures for the company in the United States.

Q. That was during the war period?

A. Yes.

Q. Do you know whether Mr. Lowey got a bonus?

A. I understand he did get a bonus.

Q. Do you know how much?

A. I understand it was $2500.

Q. How about Mr. Klee? Who was he?

A. Mr. Klee was traffic manager in our New York office. However, during the war period there was not much in the way of traffic that existed; therefore, he put in his time in various other capacities.

Q. Do you know what bonus he received?

A. I understand he received $1250.

Q. Who was Mr. Meredith?

(Testimony of Hugh Middleton.)

A. Mr. Meredith was the operating manager for the company with heaquarters in New York.

Q. Do you know what bonus he received?

A. I understand he also received $1250.

Mr. Aldwell: No further questions.

Cross-Examination

Mr. Partridge: Q. Do you know what salaries these men received, or any of them? [112]

A. No, I do not.

Q. You know that Mr. Suewer got a total bonus, Mr. Middleton, of in excess of $102,000 for this period, do you not?

Mr. Aldwell: Just a minute. I think you are assuming something not in evidence. Mr. Suewer's testimony indicates it was not a bonus; it was an adjustment of compensation.

Mr. Partridge: All right, I will adopt your description of it.

The Court: His deposition recites that.

Mr. Partridge: Yes.

Mr. Aldwell: Adjusted compensation.

The Court: He said he got a raise to $40,000 a year during the war period.

Mr. Partridge: Q. Did you know that was a fact, Mr. Middleton?

A. All I know regarding that is what I heard here in this court.

Q. And that is true about those other bonuses; you know nothing of your own personal knowledge respecting them, is that correct, the ones you testified to?

(Testimony of Hugh Middleton.)

A. Those that I have testified to, and also in my own case, I naturally know something about them through conversations with Mr. Suewer.

Q. You know your own because you got that; the rest of them you heard these men got, is that correct?

A. I was told that is what they received by Mr. Suewer. [113]

Mr. Partridge: That is all.

The Court: Q. What salary were you getting during the war years? I do not think that was mentioned. You said it was less than $600 in one of the depositions.

Mr. Aldwell: I think it is in Mr. Suewer's deposition.

The Court: I would like to get that straight.

Q. What was your salary during the war period?

A. During, well, I believe it was along about August, 1943, my salary was $400 per month.

Q. And then you received a raise?

A. I received increases at the same time that other members of the staff received increases, and I believe one was in the spring of 1945, when my salary was increased to approximately $515 per month, and then there was a subsequent increase in the late summer of 1945, which brought my salary up to approximately $540. I do not recall the exact figure.

The Court: It is already in the record what Mr. McManus' salary was.

(Testimony of Hugh Middleton.)

Mr. Aldwell: Yes. That is the one Mr. Suewer stated was getting less than $600.

The Court: Q. Do you know what Mr. McManus' salary was?

A. Not exactly, but it was presumably less than mine.

Mr. Partridge: If counsel cares to, I have these figures with respect to Mr. McManus' salary, which I shall read to his Honor if you would agree, counsel, subject to any correction. [114]

On December 1, 1941 his salary was $250 a month. October 15, 1942, it was $350. October 1, 1943, it was $412.50. May 1, 1945 it was $463.53. That continued until the conclusion of the war.

Mr. Aldwell: That is all I have, your Honor.

Mr. Partridge: One more question.

Q. Mr. Pierson hired you originally, did he not, Mr. Middleton?

A. I was hired by Mr. Pierson, also with Mr. Bradford being present.

Mr. Partridge: That is all.

The Court: That is all.

Mr. Aldwell: That completes our case, your Honor.

Mr. Partridge: I would like to offer the entire deposition of Mr. Pierson in evidence, may it please the court, and invite your Honor's examination of it at his leisure, and if counsel will deem it has been read in evidence—

The Court: It does not change the testimony that Mr. Pierson gave, in any way, does it?

Mr. Partridge: No.

Mr. Aldwell: No. I think the other parts of his deposition, other than what I read, are largely matters that were covered in his direct examination here. That is the reason I did not put the whole thing in.

The Court: The part you referred to only had to do with the conversation. [115]

Mr. Aldwell: That is correct, yes, your Honor.

Mr. Partridge: I believe part of it is in evidence, and it is only proper to have the entire deposition in evidence, and it is for that reason that I offer it.

The Court: Even the procedure of your opponent was not quite correct. Apparently everybody is satisfied to do it that way, but there is no procedure for introducing a deposition of a party when he is here at the trial, unless it is used in his cross-examination in some way. I do not think it particularly adds anything to what I have here in the form of the deposition of Mr. Suewer and the testimony of Mr. Pierson as to the vital matters connected with their conversations. It would not add anything to introduce the deposition.

Mr. Aldwell: I have no objection to the whole deposition going in.

The Court: If you wish to do that, it may be considered in evidence, then.

Mr. Partridge: Thank you, your Honor. We have no further testimony, your Honor.

The Court: The question is, was there a contract and what was it? Isn't that the legal question involved here?

Mr. Partridge: Yes. Shall I briefly address your Honor on the subject, or not?

The Court: Yes, we might as well use the time now and do that. [116]

(Argument.)

The Court: Suppose you do this: It is getting past the noon hour. You have submitted this line of authorities. Suppose you file now your authorities, Mr. Aldwell, and if there is anything you want to reply to Mr. Aldwell's memorandum, you may do so. How much time would you want?

Mr. Aldwell: Ten days.

The Court: How much time would you want to reply to his memorandum?

Mr. Partridge: I think another five.

The Court: Suppose we mark the matter submitted on the basis of ten days for you to file your memorandum and five days to reply.

Mr. Partridge: If it does not perhaps inconvenience your Honor, I should like to ask for ten days also.

The Court: Very well, then, ten and ten, then.

[Endorsed]: Filed Sept. 16, 1948.

[Title of District Court and Cause.]

DEPOSITION OF ROBERT F. SUEWER

Be it remembered: That on Wednesday, July 30, 1947, pursuant to written stipulation of counsel hereunto annexed, at the offices of Messrs. Brobeck, Phleger & Harrison, Suite 1100, 111 Sutter Building, in the City and County of San Francisco, State of California, personally appeared before me, Eugene P. Jones, Esq., a notary public in and for the City and County of San Francisco,

(Deposition of Robert F. Suewer.)

State of California, authorized to administer oaths, etcetera, Robert F. Suewer, a witness called on behalf of the defendants.

Robert G. Partridge, Esq., represented by Leo M. Cook, Jr., Esq., appeared as counsel for plaintiff; and Messrs. Brobeck, Phleger & Harrison, represented by Alan B. Aldwell, Esq., appeared as counsel for defendants; and the said witness, having been by me first duly cautioned and sworn to tell the truth, [1] the whole truth, nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the counsel for the respective parties that the deposition of the above named witness may be taken on behalf of the defendants at the offices of Messrs. Brobeck, Phleger & Harrison, Suite 1100, 111 Sutter Building, in the City and County of San Francisco, State of California, on Wednesday, July 30, 1947, before Eugene P. Jones, a notary public in and for the City and County of San Francisco, State of California, and in shorthand by Kenneth G. Gagan.

(It is further stipulated and agreed by and between the counsel for the respective parties that the deposition, when transcribed into longhand typewriting, may be read into evidence by either party on the trial of said cause; that all objections as to the notice and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the

(Deposition of Robert F. Suewer.)

time of taking said deposition, and that all objections as to materiality, relevancy, and competency of the testimony are reserved to all parties for the time of trial.

(It is further stipulated by and between counsel for the respective parties that the deposition, when completed, may be sent to the witness by the notary for reading over, correcting and signing thereof, but that said signing need not be attested [2] by the notary.)

Mr. Aldwell: It is stipulated that the signature of the witness to the deposition is waived but that the witness may make corrections and report the corrections; so stipulated?

Mr. Cook: So stipulated.

Mr. Aldwell: I presume we should have the usual stipulation on this, that all objections as to the form of the questions are to be made at this time and all other objections reserved for trial.

Mr. Cook: That is correct.

ROBERT F. SUEWER,

called as a witness by defendants; sworn.

Direct Examination

Mr. Aldwell: Q. Mr. Suewer, will you state your full name for us?

A. Robert F. Suewer.

Q. What is your address?

A. Manhasset Bay Yacht Club, Long Island; business address is 90 Broad Street, New York.

Q. Are you an officer of the De La Rama Steamship Co., Inc.? A. Yes.

(Deposition of Robert F. Suewer.)

Q. What is your position? [3]

A. I am vice president.

Q. For how long have you been vice president of the corporation?

A. Since February 23, 1946.

Q. What was your capacity with the corporation prior to that?

A. I was the United States Manager.

Q. How long did you act in that capacity?

A. Since July 1, 1940.

Q. By what, if anything, was your appointment evidenced? Do you have anything in writing, I mean, as United States Manager?

A. Yes; I have a letter from the President and I am quite certain the powers of attorney they gave me at that time designated me as United States Manager.

Q. Who is the president of the corporation at the present time?

A. Don Esteban De La Rama.

Q. How long has he been president, if you know?

A. Shortly after the war ended he took over the presidency.

Q. Who was the president before him?

A. Enrico Pirovano.

Q. How long had he been president of the corporation, if you know? He died, did he not?

A. Yes. I know he was president in January of 1939, and I presume he was—

Q. Well, that is far enough. Under what laws is the De La Rama Steamship Co., Inc., incorporated? [4] A. Philippine Islands.

(Deposition of Robert F. Suewer.)

Q. The De La Rama Steamship Co., Inc., is the same corporation at all the times material that are alleged in Mr. Pierson's complaint? A. Yes.

Q. It has always been the same corporation?

A. Yes.

Q. There has been no change in this corporation? A. No.

Q. Do you know when it was incorporated? If you don't know it doesn't make any difference.

A. It goes back to 1800 something.

Q. In February 1944, how many employees did the corporation have in the United States, approximately? A. You mean in our three offices?

Q. In your three offices in the United States.

A. 65 to 75, to the best of my knowledge.

Q. Have there been any material changes in the number of employees from that time until now?

A. I think it has probably decreased by about ten people or so.

Q. Are you the only officer of the corporation at the present time in the United States?

A. Yes.

Q. Have you, as a matter of fact, been the only officer of the corporation in the United States? [5]

A. Yes, except when the president was visiting here.

Q. I mean permanently in the United States.

A. Yes.

Q. That is true, is it, at the time when you were just the United States Manager?

A. That is correct.

(Deposition of Robert F. Suewer.)

Q. Will you relate the circumstances whereby communications were severed between the Philippines and the United States after the Japanese invaded the Philippines? What happened after that in so far as the conduct of the business or the work in the United States was concerned?

A. Well, on December 7th war broke out, December 7, 1941. We remained in communication with Manila in a sort of haphazard fashion until about the end of December of that year. I believe it was on December 13, 1941, that I received a cable from Manila in which they quoted a cable they had sent to the Philippine National Bank, New York, authorizing the bank to release to me certain powers of attorney which they termed wartime powers of attorney. I believe you want to know about changing my status?

Q. Yes.

A. It came about on that date in December, 1941.

Q. Can you tell us briefly what that change in status was?

A. It was a very short power of attorney which authorized me to handle the vessels of the company, a little more complete [6] than my ordinary power of attorney.

Q. Your ordinary power of attorney refers to what?

A. The usual power of attorney given to a manager so that he can efficiently operate an office distant from the home office. I was empowered to open bank accounts; I was told how to deposit the moneys; I was authorized to make the necessary

(Deposition of Robert F. Suewer.)

arrangements with the customs authorities, similar to that.

Q. What about employing the personnel?

A. Oh, I had authority to employ personnel in the lower ranks but, as a matter of fact, I had instructions from the president to consult with him if I were going to take on additional help.

Q. What authority did you have in so far as the fixing of salaries and so forth was concerned?

Mr. Cook: At what time is this?

Mr. Aldwell: Well, let's go back first to before your wartime power took effect. What authority did you have then as to fixing salaries, and so forth?

A. I did not have any authority to fix salaries.

Q. What was your procedure in arriving at salaries at that time?

A. Well, during that period if I had occasion to increase some salaries I would write to our president, in Manila, asking for his authority. If I remember correctly, he granted me that authority specifically. In other words, I did not have complete power to increase.

Q. Directing your attention to the period after, shall we call [7] it your wartime power came into effect, what was the situation then?

A. Well, it hadn't changed specifically, although I think it would be reasonable to assume that being out of contact with Manila, they would have expected me to take upon myself some such authority.

Q. You know Mr. H. H. Pierson, the plaintiff in this case? A. Yes.

(Deposition of Robert F. Suewer.)

Q. How long have you known him?

A. Since early 1939.

Q. Do you know when Mr. Pierson was employed by the defendant, De La Rama Steamship Company?

A. Well, it would have been effective as of July 1, 1940, when De La Rama Steamship Company purchased De La Rama Steamship Agencies, Inc.

Q. Mr. Pierson continued on in that employment? A. That is correct.

Q. Do you know who fixed Mr. Pierson's salary at the time? A. The president, Mr. Pirovano.

Q. Do you know what that salary was?

A. I think it was $600 a month.

Q. When did Mr. Pierson leave the employ of your company?

A. Oh, about, I should think perhaps six or eight months ago; I don't know the exact date.

Mr. Aldwell: I guess we can stipulate it was August 31, [8] 1946?

Mr. Cook: Oh, certainly.

Mr. Aldwell: Q. Did Mr. Pierson leave your employ voluntarily? A. Yes.

Q. So that from July 1, 1940, until August 31, 1946, Mr. Pierson was continuously in the employ of the De La Rama Steamship Company?

A. Yes.

Q. In what capacity was he employed?

A. Pacific Coast Manager.

Q. That was his position during all of that period? A. Yes, that is correct.

(Deposition of Robert F. Suewer.)

Q. Did you also have in your employ a gentleman by the name of G. P. Bradford?

A. Yes.

Q. What was his connection with your company?

A. He was our assistant United States Manager.

Q. For what period.

A. Only for a few months; from about November or December of 1941 until, I believe, February 15, 1942.

Q. What was the relationship between Mr. Bradford and Mr. Pierson?

A. I hope I am answering it correctly; Mr. Bradford was Mr. Pierson's superior. [9]

Q. Will you state briefly what Mr. Pierson's duties were as Pacific Coast Manager?

A. That is always a tough question. He was to manage two offices, one in San Francisco and another in Los Angeles, and to conduct those offices as steamship offices generally are conducted.

Q. What was his general authority in that capacity?

A. He had control of a large number of people, and he was supposed to see to it that our ships were handled properly in these ports: he signed checks: did the customary things that a manager would do.

Q. Were Mr. Pierson's services satisfactory?

A. No.

Q. Would you elaborate on that a little?

A. Well, they were not satisfactory in this respect: He did not seem to be able to maintain

(Deposition of Robert F. Suewer.)

proper discipline in the offices. We were continually having to write to him, and occasionally I had to come out here; not occasionally—as a matter of fact, I had to come out several times a year, because the ordinary affairs of a steamship office were not progressing satisfactorily. We could not get suitable reports on our ships and cargoes, and we found him to be rather inefficient as, shall we call it, an executive in charge of a group of people?

Mr. Cook: For the purpose of the record, I will move to strike the witness's answer as being statements of personal conclusions rather than statements of fact. [10]

Mr. Aldwell: Q. Mr. Suewer, would you please state the circumstances in so far as the operation of the company was concerned, following the outbreak of the war on December 7, 1941?

A. Early in 1942 our three ocean-going ships were requisitioned by the Maritime Commission. As a Philippine corporation, therefore a foreign corporation, we were not at that time authorized to become general agents of the Maritime Commission. We found ourselves with very little to do in the early part of 1942. Meantime we were constantly pressing the Maritime Commission, which later became War Shipping Administration, to grant us a general agency contract, so that we could remain in business, because I knew that unless we could get some of these Maritime Commission ships we could not maintain our offices. We did become a general agent in the latter part of 1942. I think it was not until early 1943 that we were given any

(Deposition of Robert F. Suewer.)

ships to operate. In 1942 we just went along, maintained the offices as well as we could; we did not discharge anybody, but if anybody left we did not try to hold them. In 1943 we managed to get these ships from the War Shipping Administration, and in addition to that we took over some vessels on an agency basis, so that I believe it is fair to say that from early 1943 until the close of the war we were operating almost entirely for the War Shipping Administration in one form or another.

Q. Did you have any discussion with Mr. Pierson with regard to [11] salary, say, commencing with the period following the outbreak of the war?

A. Well, in 1942, there would have been no discussions, because Mr. Pierson knew that we were in rather a precarious position until we got these Government boats; subsequent to that we had discussions and Mr. Pierson was granted, I believe, two increases in salary.

Q. Do you recall when they were?

A. I am afraid not. I am guessing but I think that his last increase brought him up to $750 a month, or something like that.

Q. These two increases that he received, that you mentioned, in connection with them did you or did the company make application for approval for those increases to the Salary Stabilization Unit of the Treasury Department?

A. Yes; Mr. Pierson did.

Q. And those approvals were obtained?

A. Oh, yes.

(Deposition of Robert F. Suewer.)

Q. Did you have any discussion with Mr. Pierson concerning salary adjustments in the month of February, 1944?

A. It is a little difficult to remember the exact month; it is quite possible that I did in that particular month.

Q. Well, assuming that it was in that particular month, do you recall what discussion was had?

A. With regard to the salary, you say?

Q. Yes. [12]

A. No, I don't recall any discussion with regard to salary. I believe we were referring to a discussion with regard to bonus. I voluntarily told Mr. Pierson on one of my trips out here, which must have been in the spring of that year, that when the war was over and when we could communicate again with Manila, that I was going to ask our board of directors to give to certain key men, including Mr. Pierson, a bonus in addition to the usual bonus which we gave each year, and that was one month's salary, in December of each year.

Q. That was the only discussion, was it, that you had with Mr. Pierson with regard to a bonus at that particular time, that is, in the spring of 1944?

A. That is about all that I can think of.

Q. Did you at any time discuss with him at all the matter of bonus for the people in the corporation, or the matter of increase in salary for other people who were employed?

A. Well, as I say, I told Mr. Pierson at the

(Deposition of Robert F. Suewer.)

time that I was going to ask for a bonus for the key men, and that included Mr. Pierson.

Q. Was there any discussion had at that time with regard to the low salaries being paid by the company?

A. I believe Mr. Pierson said that it was his opinion that our salaries generally were below those being paid by other steamship companies.

Q. Did you make any comment with regard to that? [13]

A. Well, that question came up not only at that time—I am sure that he brought it up at other times, and we endeavored to give increases to the general office staff. He would apply to the Wage Stabilization Board and if approvals were granted it was for increases in salaries. In other words, we tried as well as we could to keep in line with the others.

Q. At the time you had this conversation with Mr. Pierson in the spring of 1944, did he threaten to resign unless some commitment was made as to either an increase in salary or a bonus?

A. No, of course not, and you must remember that I voluntarily brought up this matter of granting a bonus. It hadn't come from Mr. Pierson, at all, so there could not have been such an ultimatum.

Mr. Cook: We move to strike that answer as not responsive and as a conclusion of the witness.

Mr. Aldwell: Q. Subsequent to the spring of 1944 did you have any other discussion with Mr. Pierson with regard to the payment of a bonus?

(Deposition of Robert F. Suewer.)

A. No discussion. I suppose it was mentioned occasionally on my visits out here that I was going to speak to the board of directors about it, but no general discussion.

Q. Referring again to this discussion in the spring of 1944, do you recall whether any other persons were present during any such discussions?

A. I am quite certain there were no others present.

Q. Did you make any record of any such discussions? A. No.

Q. In February, 1944, were you Mr. Pierson's immediate superior? A. Yes.

Q. As such did you exercise supervision over his activities? A. Yes.

Q. Could you tell us in a few words just what that supervision consisted of?

A. Well, it had greatly to do with the manner of operation of the offices and with the personnel in those offices. I was the one who determined whether there should be salary increases, whether he should take on additional help; general things of that nature.

Q. Would you give us a brief outline of your experience in the steamship business?

A. I have been with the De La Rama Steamship Co., Inc. since July 1, 1940. Prior to that I was the United States Manager for MacLeod & Co., Inc., who were the general United States Agents for the De La Rama Steamship Co. For some four years prior to that I was employed by Lamport & Holt Line, an English steamship company.

(Deposition of Robert F. Suewer.)

Q. How long were you employed by MacLeod?

A. From January 1, 1939 until June 30, 1940, when the general [15] agency agreement was terminted; then I went to work for De La Rama Steamship Co.

Q. How long were you employed by Lamport & Holt? A. Approximately four years.

Q. What was your capacity with them?

A. When I left I was chief clerk. I suppose that was not the term—actually, I was assistant to the assistant manager.

Q. Have you had any other steamship experience besides that? A. No.

Q. Have you had any other business experience?

A. Yes; prior to that I was traffic manager for an exporting commission house.

Q. Where was that? A. In New York.

Q. As a result of your experience in the steamship business and your knowledge of it, have you been able to form any opinion as to, shall we say, the proper performance, the proper running of a branch office of a steamship company?

Mr. Cook: Before you answer that, I will interpose an objection to the question on the ground it calls for a conclusion and opinion of the witness, and no proper foundation has been laid for expert testimony.

A. I think I have some experience, Mr. Aldwell. When MacLeod & Company took over this general agency agreement they employed me to set up the New York office, which, of course, was a branch [16] office of, it was in effect a branch office of the

(Deposition of Robert F. Suewer.)

Manila office. I employed all the people. I obtained the office space and fitted out the office, and the responsibility was mine to see that that office ran properly. Although the De La Rama agency was not owned by De La Rama Steamship Co., there was an agreement entered between De La Rama Agency and De La Rama Steamship Co. that the New York office would have some authority over the agency offices, which were the two California offices, and in 1939 it was my duty to come out to California and see that these offices were properly set up.

Q. Based upon your experience in the steamship business, are you able to form an opinion as to the relative comparison between various steamship companies in so far as the duties of their managers are concerned?

Mr. Cook: We object to the question on the ground it is vague and indefinite in form, and calls for the opinion and conclusion of the witness.

Mr. Aldwell: Do you feel you can answer that question?

A. I think generally that I could do so.

Q. Do you consider Mr. Pierson's duties as Pacific Coast Manager as comparable to the duties of similar managers of other comparable steamship companies?

A. They were not in our particular company.

Q. Why not?

A. Because Mr. Pierson was not able to perform his duties properly. [17]

(Deposition of Robert F. Suewer.)

Mr. Cook: I will move to strike that answer on the ground it is not responsive.

Mr. Aldwell: All right: I think we can stipulate that the answer is not responsive.

Q. What I was trying to find out was, assuming that the duties were properly performed, were they comparable?

A. Yes, comparable to steamship companies of a like size.

Q. But, as you stated some time ago, in your opinion the services of Mr. Pierson were not satisfactory? A. That is correct.

Mr. Cook: To which objection was made and renewed at this time.

Mr. Aldwell: Q. In your capacity as United States Manager for the Defendant, and as Mr. Pierson's direct superior in this country, did you consider that his services were such that he would be entitled to extra compensation at the end of the war?

A. Yes, in the form of this bonus which I told him I would refer to the directors?

Q. When the war ended, when did you re-establish communication with Manila?

A. In the second half of 1945; I can't recall the exact date.

Q. As a result of that re-establishment of communication, was there any change in the manner of operation of the corporation in this country from what you have previously described during [18] the war years? A. No.

(Deposition of Robert F. Suewer.)

Q. Did you make any trips to Manila?

A. Yes; I went out to Manila in February of 1946.

Q. When did you return to this country?

A. Late March, early April of the same year.

Q. What was the purpose of the trip, generally?

A. I reported to the directors and owners the operation of the United States offices during the war.

Q. While you were there did you discuss with the board of directors and the management the matter of bonuses to employees in the United States? A. Yes.

Q. Can you state substantially what the discussion was in that regard?

A. It was not very lengthy. I told them I thought that certain key individuals in the United States should be paid a bonus in addition to the usual month's bonus, and they suggested that upon my return to the United States that I suggest to them who should receive these bonuses and how much they should be.

Q. Did you do that? A. I did that.

Q. Did you specifically recommend the particular individuals who were to receive, or who should receive a bonus? [19] A. Yes.

Q. And the amounts that they should receive?

A. Yes.

Q. Were those recommendations of your approved by the board of directors? A. Yes.

Q. Was any change made by them?

A. No.

(Deposition of Robert F. Suewer.)

Q. In making your recommendation as to the bonus for Mr. Pierson, how did you arrive at the amount which you recommended?

A. I considered that there had been approximately four years involved, and I thought that an additional bonus of $500 or so a year would be suitable, and I finally arrived at a round figure of $2500 for the entire period.

Q. Do you have any knowledge as to bonuses that may have been paid by other comparable steamship companies—and when I say "bonus" I mean bonus paid at the end of the war as distinguished from annual bonus.

A. No, I don't.

Q. What other employees on the Pacific Coast received bonuses at that time?

A. Mr. McManus, who was the operating manager, Mr. Middleton, who was the manager in charge of Los Angeles.

Q. What bonus did they receive?

A. Exactly the same as Mr. Pierson. [20]

Q. So that all three men received $2500; is that correct? A. That is correct.

Q. Did Mr. Pierson, during the month of February, 1944, state to you that the salary paid by the company to him for the services performed and to be performed was insufficient and inadequate?

A. No.

Q. Did he ever make such a statement to you?

A. Not exactly that statement. At times he asked for an increase in salary, and, as I say, we

(Deposition of Robert F. Suewer.)

granted him several increases, rather I granted him several increases.

Q. Did he ever state to you, either in the month of February, 1944, or any other time, that the salary being paid to him was less than the reasonable value of his services? A. No.

Q. Other than what you have just said?

A. No.

Q. Did he ever state to you during the month of February, 1944, or at any other time, that the salary being paid to him was less than the salary paid to other persons holding comparable positions and performing comparable duties in other similar steamship companies, other than what you have already stated? A. I do not recall.

Q. Did he ever state to you during the month of February, 1944, or at any other time, that by reason of the insufficiency [21] and inadequacy of his income he was unable and unwilling to continue his employment with the company as its Pacific Coast Manager, and would therefore resign from their employ? A. No.

Q. Did you ever, either in the month of February, 1944, or at any other time, state to Mr. Pierson that if he, Mr. Pierson, would not resign his position and would continue in his employment and in the performance of his duties until the termination of actual combatant warfare by the United States the corporation would pay him a bonus which together with the salary received by him from December 7, 1941, to the date of the termination of

(Deposition of Robert F. Suewer.)

said actual combatant warfare, which would equal a salary and bonus paid other persons holding comparable positions and performing comparable duties in other similar steamship companies?

A. No.

Q. Was any application ever made by the corporation to the salary stabilization unit of the Treasury Department, or other administrative agency of the Government, having jurisdiction over wage adjustments, for the approval of the payment of any bonus to Mr. Pierson other than the annual bonus which you have testified to? A. No.

Q. As far as you know, was there any approval for the payment of any such bonus by such unit or agency? [22]

A. No. I am not quite clear. I am trying to recall whether it was necessary to obtain the approval of the Wage Stabilization Board for his $7500 a year. I think that had expired by that time, but I am not certain.

Mr. Aldwell: I believe that is all.

Cross-Examination

Mr. Cook: Q. Mr. Suewer, have you at any time been a member of the board of directors of the De La Rama Steamship Company? A. No.

Q. What has the basis of your compensation been? Have you been on a salary plus bonus?

A. No; salary plus commission on net profits of the corporation.

Q. Has that been true from December 7, 1941, to the present time?

(Deposition of Robert F. Suewer.)

A. No. To the present time, you say?

Q. Yes.

A. It was true for the past fiscal year which ended on September 30th of last year.

Q. Well, during the period of the war from December 7, 1941, to VJ Day, what was the basis of your earnings from the company; were you on a salary basis then? A. Yes.

Q. Plus a bonus? A. No.

Q. Did you receive the usual month's bonus each year? [23] A. No.

Q. May I ask what that salary was during the war years?

A. I think that in order to clarify this I must tell you exactly what occurred.

Q. Certainly; go right ahead.

A. During the so-called war years I took exactly the same salary that I had been taking previonsly, which was $12,000 per year. In February of 1946 when I was in Manila, I discussed with our directors the matter of my salary for those war years, and the fact that I hadn't been able to obtain suitable compensation on a commission basis, everything had been thrown haywire by the war, and the fact that our ships were taken over by the United States Government; in other words, we were not earning freight moneys such as that. As I say, I took $12,000 per year with no additional compensation, and that was one of the things we discussed in Manila, and we decided, the directors decided then that I should be compensated for those

(Deposition of Robert F. Suewer.)

war years at the rate of $40,000 per year, that is, an additional $28,000 per year for the war years.

Q. That amount has been paid you?

A. Yes.

Q. This Mr. Bradford, whom you mentioned, who is No. 2 man in the corporation, do you know what he was being paid in those few months he worked in 1942 before he left to go into some branch of the American war service? [24]

A. I will have to guess at it. I think it was $900 a month.

Q. He later rejoined the organization?

A. Yes.

Q. Is he still with the organization?

A. No; he left us.

Q. When he came back do you know what salary he came back at?

A. I am reasonably certain it was $1000 a month.

Q. As I understood your practice, Mr. Suewer, with the Pacific Coast Manager and other key employees, it was to pay them a certain monthly salary plus one month's salary as a bonus per year?

A. Correct.

Q. Did that extend throughout your organization to everyone? A. Yes.

Q. Did Mr. Bradford receive any war bonus?

A. No.

Q. Now, under Mr. Pierson came Mr. McManus, was it, as traffic manager?

A. No; he was operating manager.

(Deposition of Robert F. Suewer.)

Q. Operating manager. And generally speaking, Mr. McManus—was he next in line down or was he not?

A. No; Mr. Middleton was next in line.

Q. You said Mr. Middleton. Mr. Middleton was in charge of the Los Angeles office through the war?

A. Yes; Los Angeles and Long Beach offices.

Q. How many men did he have under him roughly, how many employees?

A. I would say he had between 15 and 20.

Q. Is it fair to state that Mr. Middleton was getting a salary in the nature of $400 to $450 a month when the war started?

A. Based on what he says, I would say yes.

Q. Was he granted any increase during the war period?

A. Yes, along with everybody else.

Q. What was the highest salary that he was paid during the war years?

A. I believe $500 a month.

Q. Taking Mr. McManus, who was the operating manager, do you have any recollection as to his salary during the same period; were they lower than Mr. Middleton?

A. Yes, it would be somewhat lower than Mr. Middleton's.

Q. $50 or $100 a month lower? A. Yes.

Q. What was Mr. McManus' status in the organization as it bears relation to Mr. Pierson?

A. Well, I may not be answering this correctly,

(Deposition of Robert F. Suewer.)

but Mr. Pierson was the Pacific Coast Manager; then would come Mr. Middleton, and then would come Mr. McManus.

Q. They were subordinate in their positions to Mr. Pierson? A. Yes.

Q. Just as Mr. Pierson was subordinate to you?

A. Correct.

Q. Do you know where this power of attorney which was cabled to the Philippine Bank in New York, covering your handling of the company during the war, now is?

A. Yes; I have a copy of it in New York.

Q. One can be secured?

Mr. Aldwell: We will produce that if you wish.

Mr. Cook: Q. You did not actually hire Mr. Pierson, that was done by the president of the company, I take it, when the De La Rama Agencies were taken over by the De La Rama Company?

A. Well, I suppose that is correct; all the organization went along, you see.

Q. But you testified, I believe, that his salary was set by the board of directors rather than by you? A. That is correct.

Q. During the war years have you any recollection as to when Mr. Pierson first mentioned the matter of an increase in his salary to you?

A. No, but I would assume it was sometime in 1943.

Q. 1943. In asking for an increase, did he ask for one for himself, or for one for himself and the other key men, as we call it, in the organization?

(Deposition of Robert F. Suewer.)

A. I believe he asked for general increases, I think that was it. The matter of high cost of living came up, the necessity for increasing salaries generally was brought up. [27]

Q. That resulted in your authorizing him to apply for an increase to the Salary Stabilization Unit of the Treasury Department, I believe it was?

A. Yes.

Q. And he was to make that application on behalf of the company? A. Yes.

Q. Do you recall Mr. Pierson asking you to apply for such increases through the New York office rather than to require him to do it here in San Francisco? A. No, I don't recall.

Q. Do you recall such a request being made as to any later increase after the first increase that was granted him? A. No, I do not.

Q. Is it that you do not remember, or—

A. Yes; I don't remember.

Q. He could have? A. He could have.

Q. Coming up to February, 1944, how many vessels was your company operating generally, if you recall? A. 20.

Q. 20 vessels, either as general agents or under agency contracts?

A. Oh, no. If you consider the agency contracts, there were more, and it would be difficult to say how many vessels, because we would only get one as it came into port, so I could hardly [28] cover that.

Q. Well, it is fair to state, isn't it, that you

(Deposition of Robert F. Suewer.)

were operating a substantially larger number of vessels than you had operated as a private operator before the war, when you say you had three?

A. Yes; we had three of our own, but we had agency vessels, too, as well.

Q. Had your business doubled or tripled in size?

A. Well, the number of vessels which we handled was greater, but we handled it in a different manner, so it is difficult to say whether business had doubled or tripled, because we were—in most of the ships we had nothing to do with cargo; with the agency, or with the sub-agency vessels we handled some cargo.

Q. Looking at it from a standpoint of earnings, and speaking of gross earnings, I am thinking of taxes, of course; during the war years that was substantially higher than before the war, I presume, the gross earnings. The company was making more money?

A. Considerably less, I would say.

Q. Was it less?

A. Yes, because prior to the war we operated our own ships, and we obtained all the revenue from them, whereas during the war we were paid the usual commission, and the usual practice was give everything to the Government after certain expenses [29] were deducted.

Q. But your offices in this country were doing a great deal more work, perhaps, even though they were making less money?

(Deposition of Robert F. Suewer.)

A. They were doing more work, yes.

Q. Now, sometime in February, or, let us say, in early 1944, Mr. Pierson discussed the question of salaries again with you, didn't he?

A. It is quite possible; I could not say definitely.

Q. And he told you that in his opinion the salaries were below those being paid by other steamship companies in this area for substantially similar work. He told you that your scale was lower?

A. I don't know that he said it at that time.

Q. But at various times he did say that?

A. At various times he said so.

Q. At that time did he tell you that unless your salaries were increased your company would lose some of its key men?

A. He said that on several occasions.

Q. Did you understand by "key men" that he included himself?

A. I am sure he did not; he would have referred to himself if he meant himself.

Q. During this period from 1944, Mr. Pierson told you, did he not, that unless some arrangement would be made for the payment of a bonus or an increase in salary that he would have to look for other connections? [30] A. No, he did not.

Q. Is it that you don't remember such a statement, or that you have a positive memory that no such statement was made?

(Deposition of Robert F. Suewer.)

A. Yes; I am positive that no such statement was made.

Q. Nevertheless, during this period of time you told Mr. Pierson that after the war was over, or Manila freed, you would recommend to the board of directors of your company that a wartime bonus be paid to the key men in the San Francisco office?

A. I told him I would recommend it for the key men in all the offices.

Q. You would recommend it for the key men in all the offices, including the San Francisco office?

A. Yes.

Q. And by "key men" you included Mr. McManus and Mr. Middleton?

A. Well, I told him at that time that I would particularly include him along with the key men.

Q. Did you tell him at that time that you did not have the authority to grant the bonus without consulting the board of directors?

A. I told him that in my opinion I did not have such authority.

Q. That was the reason you gave to him for not then and there granting the bonus, that it was because you felt you did not have that authority?

A. That is correct.

Q. But you told him that you would recommend a bonus to the board [31] of directors?

A. That is correct.

Q. And you told him that you believed that the board of directors would follow your recommendation? A. Yes.

(Deposition of Robert F. Suewer.)

Q. Did you at that time personally know the board of directors of the company?

A. I knew the president.

Q. Was it a family company? A. Yes.

Q. Members of the family serving as the board of directors? A. Yes.

Q. But you had never met the other directors, themselves? A. No.

Q. Did you have any discussion with Mr. Pierson as to what the amount of bonus would be?

A. No.

Mr. Aldwell: That is, at any time?

Mr. Cook: Well, at this particular discussion.

Mr. Aldwell: You are talking now about the spring of 1944.

Mr. Cook: Yes, spring of 1944.

The Witness: A. No.

Mr. Cook: Q. Did this discussion with regard to a bonus follow up any statement by Mr. Pierson as to the lowness of the salary scale in the San Francisco office? [32] A. No.

Q. You stated on direct examination that you made the statement voluntarily to him. Could you explain that? Did you just go into his office and start talking to him about bonuses?

A. Well, Mr. Pierson was one of two people with whom I discussed it. One was a man in New York, and the other was Mr. Pierson, and I was out here on one of my usual visits, and I merely said to him that "When the war is over I am going

(Deposition of Robert F. Suewer.)

to recommend to the board of directors that we pay these additional bonuses."

Q. Did you have a man in your New York office similar in position to Mr. Pierson out here; an East Coast Manager, shall be say?

A. Yes. Well, that is not the full answer. He was my assistant, and he was in charge of the New York office, and he also was superior to Mr. Pierson.

Q. What was his name? A. Griffin.

Q. Do you recall what salary he was paid during the war years?

A. I think between seven hundred fifty and eight hundred fifty dollars a month.

Q. You say he was superior to Pierson. Did Pierson report to him? A. Yes, he did.

Q. Was this Mr. Griffin granted a special bonus, too? A. Yes. [33]

Q. What was the amount of that?

A. It was $26,500. I would have to look it up to be sure.

Mr. Aldwell: It is stipulated that he may show the true amount in the record here when he reads his deposition over.

Mr. Cook: That is correct.

Q. How many men did Mr. Griffin have under his direct control in the Eastern office?

Mr. Aldwell: At what time?

Mr. Cook: During the war period.

The Witness: A. Between 30 and 40.

(Deposition of Robert F. Suewer.)

Mr. Cook: Q. How many men did Mr. Pierson have under his supervision in both the San Francisco and Los Angeles offices and the Long Beach office during the war period?

A. I think it was probably somewhere around 35 people in the three offices.

Q. On what matters would Mr. Pierson have to seek the approval of Mr. Griffin in the organization?

A. On any matters that he might have to seek permission from me. In my absence Mr. Griffin would determine whether additional people should be taken on, whether any changes should be made in the offices; much of the ordinary office correspondence passed over Mr. Griffin's desk for answer, unless he could have one of his clerks answer it for him.

Q. Mr. Pierson has testied that if he wanted to hire an additional [34] man, shall we say, he would write you for approval; is that correct?

A. That is correct.

Q. And you would normally be the one to give him an approval or disapproval? A. Right.

Q. If you were not in New York at the office, why, then, Mr. Griffin would handle the matter for you? A. Yes.

Q. That is substantially the way the business was handled, if you were present in New York you would take care of Mr. Pierson's letters to you and if you were absent Mr. Griffin would do it?

A. Yes.

(Deposition of Robert F. Suewer.)

Mr. Aldwell: I think he already testified on certain matters that Mr. Griffin would take care of them.

The Witness: The ordinary business letters that Mr. Pierson would address to New York would be taken care of by Mr. Griffin, unless they went down in line and were taken care of by somebody else.

Mr. Cook: Q. What was Mr. Griffin's title? Did he have any?

A. Assistant to the United States Manager.

Q. On your way out to Manila, when you did go over there in February, 1946, did you talk to Mr. Pierson en route before you [35] left this country? A. Yes.

Q. You told him at that time, didn't you, that it was your purpose, one of your purposes, to consult the Board of Directors of the De La Rama Company and seek approval for wartime bonuses?

A. Yes.

Q. You told him at that time that you were recommending such bonuses to them?

A. I suppose so. I know I was going to speak to them about it. It would be a recommendation.

Q. Did you have any discussion at that time as to the amount that you would recommend?

A. No.

Q. Did you have any discussion as to the men whom you would recommend such bonuses for?

A. I am rather inclined to think I may have

(Deposition of Robert F. Suewer.)

told him I was going to ask for a bonus for McManus and Middleton and himself.

Q. When you got over to Manila, did you report to the board of directors in a formal meeting, or was it an informal situation?

A. Oh, I guess it would be considered a formal meeting; the directors were present.

Q. Sitting around a desk or table?

A. We were not in any office, because there were no offices, they were all blown up. We sat around a table and discussed [36] it.

Q. You reported the situation in the United States and the business during the war?

A. Yes.

Q. One of the items you brought up was the matter of a wartime bonus for these employees that we have mentioned, Pierson, McManus, Middleton and Griffin?

A. I did not refer to them by name to the directors. I told them that I wanted to give certain wartime bonuses to some key individuals in the United States.

Q. How many members were there on the board of directors? A. Seven.

Q. Were they all present at that time?

A. Yes.

Q. Was a record kept of the matters discussed at that meeting?

A. Yes, I suppose so. I don't know how complete it was kept, though. I have never seen the complete record of that.

(Deposition of Robert F. Suewer.)

Q. Can you tell me what date it was held on?

A. No, but I can find out for you.

Q. Well, the purpose of my question is that I want to see a copy of the record, the minutes of that particular meeting, and if it can be stipulated that when the date is ascertained I be given that so we can identify the meeting.

Mr. Aldwell: Just a moment.

(Discussion off record by direction of counsel.) [37]

Mr. Cook: Stipulated that the record kept of the meeting which we are discussing now will be furnished upon that request.

Mr. Aldwell: So stipulated.

Mr. Cook: Q. Well, coming back to this meeting, you asked authority to grant bonuses to key employees and that authority was given you by the board?

A. Actually, the board authorized the president to deal with these things. Whatever decision the president might make would, I suppose, be shown on a report.

Q. Did the board approve or ratify your actions taken during the war on the company's behalf?

A. I don't think it did it formally.

Q. Did they do it in any sort of manner or way?

A. Yes. They told me they were grateful for the way I had handled the affairs of the company.

(Deposition of Robert F. Suewer.)

Q. Did they approve of you having told Pierson, and Griffin, I assume, was also told, that request would be made to the board for the granting of substantial wartime bonuses?

A. I don't know that I put it to them exactly that way. I recommended that certain bonuses be granted, and they agreed.

Q. Did you tell the board that during the war you had told various members of your organization that you would ask for such approval after the war? Let me clarify that.

Did you bring it up to the board as though it were a new matter that had first come to your attention, or did you state [38] to them the matter had come up during the war and you stated you would then bring it up at the end?

A. I wonder if you would read that to me.

(The question was read by the reporter.)

A. I did not refer to it in either of those ways. I merely said in effect that I thought these men should be given a wartime bonus. Nobody questioned whether or not I had thought of it during the war or at the end of the war. It was extremely informal.

Q. And the board then gave the president authority to grant such bonuses as he determined upon, based on your recommendations?

A. They gave him authority, that in effect is it; they gave him authority if he saw fit to approve my request.

(Deposition of Robert F. Suewer.)

Q. Were you to set the amounts upon your return to the United States? A. Yes.

Q. On your way back through Los Angeles on your return to the United States you saw Mr. Pierson again, didn't you? A. Yes.

Q. At the Biltmore, I believe?

A. At the ship.

Q. What? A. At the ship.

Q. Oh, at the ship? A. Yes. [39]

Q. Did you tell him that you had gotten authority to set the bonus?

A. I probably did; I don't remember.

Q. Was there any discussion at that time as to the amount?

A. No. As a matter of fact, I don't recall any discussion on that subject. You see, we came in on this ship rather late at night, and we went to the Biltmore with a crowd, and I am quite certain we left the next day for New York.

Q. Then you don't remember whether or not you discussed the matter of bonus with Mr. Pierson on the occasion of your arrival at Los Angeles in March or April, 1946?

A. I don't remember, but I am inclined to think I did.

Q. At what time did you establish the amount of the bonus?

A. When I returned to New York.

Q. Did you communicate the names of those who were to receive bonuses and the amounts to the president of the company? A. Yes.

(Deposition of Robert F. Suewer.)

Q. By letter, or by cable?

A. I think both by cable and letter. I believe I cabled and then confirmed it by letter.

Q. Are copies of those documents in your New York files? A. Yes.

Mr. Cook: Will they be produced for us later on?

Mr. Aldwell: Yes.

Mr. Cook: Q. You don't remember them at this time? A. No. [40]

Q. Were the amounts recommended in those letters and cables the same as those ultimately given?

A. Yes, except in one instance, I think. No; I am quite certain they were the same. I will check that when I go back.

Q. A cable, No. 40, was sent to your company with regard to the payment of these bonuses. Do you recall what that cable contained?

A. No.

Q. For the record, that is the cable that is referred to on the check stub of the bonus check?

A. Then that must be the cable authorizing me to pay it.

Q. That document is also in your New York office? A. Yes.

Q. That can be produced on request?

A. Yes.

Q. The check stub also bears reference to a resolution by the board of directors, De La Rama

(Deposition of Robert F. Suewer.)

Steamship Co., Inc., on July 11, 1946; have you ever seen that resolution, or do you know what it contained?

A. Well, I must have seen it, and it certainly must refer to these bonuses.

Mr. Cook: We will also request that.

Mr. Aldwell: That is July 11, 1946.

Mr. Cook: July 11, 1946. It is on one of the letters, and the check stubs. [41]

Mr. Aldwell: Yes.

Mr. Cook: Q. The bonuses then paid were, roughly, as follows: Griffin, who was getting $850 a month, or thereabouts, was given a salary adjustment amounting to $26,500. You can check that figure. Pierson, who was then being paid $750, got and equal bonus of $2500 as Mr. Middleton, who was getting approximately $600 and who got a bonus of $2500, and Mr. McManus, who was then getting less than $600, and who got $2500 bonus?

A. That's right.

Q. At the time you recommended the $2500 bonus for Mr. Pierson, you did not know that he was intending to leave your organization, did you?

A. No.

Q. You did not know whether he would stay or leave; you probably did not know anything about it; is that correct?

A. I don't believe I can remember that.

Q. One of the key employees, named McManus, had already left your company at the time the bonus was paid? A. That is right.

(Deposition of Robert F. Suewer.)

Q. Did any question come up as to whether or not he should be paid the bonus in view of the fact he had already left the company?

A. No. It was for his wartime work.

Q. As a matter of fact, you received a letter from Mr. Bradford, did you not, urging you to make the payment, regardless of [42] the fact that McManus had already left?

A. It is quite possible.

Q. Such a letter would be in your New York files?

A. If there is such a letter, yes.

Q. Did you have any communication with the president of the company other than this one cable respecting the amount of the bonus? A. No.

Q. No telephone conversation? A. No.

Q. Or other letters? In setting the amount of the wartime bonus you said you took a figure of roughly $500 per year in arriving at the total. Actually, that was for each year, that was slightly less than the normal bonus that was paid, consisting of one month's salary?

A. That's right. Well, it was not in each case, I don't believe, but in Mr. Pierson's case.

Q. Mr. Pierson's case, it was less than his normal bonus taking it on a yearly basis.

A. Yes, it was less than the month's bonus per year.

Q. Did you bring the bonus checks with you from New York when you came out last year?

(Deposition of Robert F. Suewer.)

A. Yes, I did.

Q. Did you deliver any of them personally?

A. No; I gave them to Mr. Bradford to deliver.

Q. You did not talk to Mr. Pierson about the bonus, did you? [43] A. No, I did not.

Q. Did you get a letter from him asking to talk to you about it? A. Yes.

Q. But you did not discuss the matter with him? A. No.

Q. Is there any reason why you did not discuss it with him?

A. Yes; I did not think it was open to discussion.

Q. Why did you set Mr. Pierson's bonus at $2500, whereas Mr. Griffin's was in the neighborhood of $12,000?

A. Mr. Griffin was Mr. Pierson's superior, he had a far more important job, and he was a far more efficient employee; he was entitled to it.

Q. Why were Mr. Pierson's subordinates, Mr. Middleton and Mr. McManus, given the same bonus as Mr. Pierson?

A. Because I felt very strongly that Mr. McManus was doing a job in the San Francisco office which was superior to the job Mr. Pierson was doing. As a matter of fact, I felt that McManus was running the office and I always felt that Mr. Middleton was doing a superior job to Mr. Pierson, and, therefore, I felt they were entitled to just as much as Pierson, and he was not entitled to any more.

(Testimony of Robert F. Suewer.)

Q. Then you based your wartime bonuses, not on salaries which were being paid during the wartime, but upon your personal estimate of the merits of the individuals? [44] A. That is correct.

Mr. Cook: That is all I have at this time.

Redirect Examination

Mr. Aldwell: Q. What were Mr. Bradford's duties?

A. Well, he was in charge of the West Coast offices.

Q. In other words, he had more responsibility, did he, than Mr. Pierson?

A. Oh, yes; I gave him more responsibility. Perhaps that is a better way to put it.

Q. On your cross-examination Mr. Cook questioned you with regard to the relative amount of business before the war and during the war. How did the size of your offices compare, as far as the number of employees was concerned before the war and during the war, that is, after you got into this agency business for the War Shipping Administration?

A. The staffs were increased during the war.

Mr. Aldwell: I think that is all I have.

Recross Examination

Mr. Cook: Just one other question. In figuring out these bonuses, did you take into consideration the fact Mr. Pierson's salary during the war had been under what was being paid similar officers of other companies in San Francisco?

(Deposition of Robert F. Suewer.)

A. No. I judged the amount which he was to receive upon his own merits, if I make myself clear. [45]

Further Redirect Examination

Mr. Aldwell: Q. In this discussion in the spring of 1944 when you testified you volunteered to Mr. Pierson that at the end of the war you would recommend to the board of directors that a wartime bonus be granted, was that volunteering by you that you would recommend a bonus based on, or intended to be based upon salaries paid by other companies, or was it based on the merit of the particular employee?

A. Based on the merit of the particular employee.

Q. And that is what you had in mind, was it, at the time, or was it expressed that way to him?

A. Well, no, I wouldn't have expressed it to him that way.

Q. Well, that is what you had in mind?

A. I don't believe there was much discussion. I merely said that I was going to recommend that these men get a bonus.

Q. And that is all there was to it, is that right?

A. We did not talk about it a great deal.

Mr. Aldwell: All right; thank you.

Mr. Cook: Thank you.

/s/ ROBERT F. SUEWER. [46]

State of California,
City and County of San Francisco—ss.

I certify that, in pursuance of stipulation of counsel, on Wednesday, July 30, 1947, before me, Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Brobeck, Phleger & Harrison, Suite 1100, 111 Sutter Building, in the City and County of San Francisco, State of California, personally appeared Robert F. Suewer, a witness called on behalf of the defendants in the cause entitled in the caption hereof; and Robert G. Partridge, Esq., represented by Leo M. Cook, Jr., Esq. appeared as counsel for plaintiff; and Messrs. Brobeck, Phleger & Harrison, represented by Alan B. Aldwell, Esq., appeared as counsel for defendants; and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Kenneth G. Gagan, and thereafter reduced to typewriting; and I further certify that in pursuance of stipulation of counsel I forwarded the said deposition to the witness and it was signed by him without my presence and returned to me.

And I do further certify that I have retained the said [47] deposition in my possession for the purpose of mailing the same with my own hands

to the Clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition named, nor in any way interested in the event of the cause named in the said caption.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office aforesaid this 29th day of October, 1947.

(Seal) /s/ EUGENE P. JONES,
Notary Public in and for the City and County of San Francisco, California. [48]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto that the deposition of R. F. Suewer, a witness on behalf of defendant The De La Rama Steamship Co., Inc., may be taken at the offices of Messrs. Brobeck, Phleger & Harrison, Room 1100, 111 Sutter Street, San Francisco, California, at 2:00 o'clock p.m., on Wednesday, July 30, 1947, before Eugene P. Jones, a notary public in and for the City and County of San Francisco, State of California, and in shorthand by either Kenneth G. Gagan or Fred J. Sherry, Jr., and that this stipulation shall constitute reasonable notice within the meaning of Rule 30 of the Rules of Civil Procedure.

It Is Hereby Further Stipulated that the deposition of said witness when written up may be read in evidence at the trial by said defendant without further proof that the witness is at a greater distance than 100 miles from the place of trial.

Dated July 30, 1947.

/s/ BROBECK, PHLEGER & HARRISON,

/s/ HERMAN PHLEGER,

/s/ ALAN B. ALDWELL,

Attorneys for Defendant, The De La Rama Steamship Co., Inc.

/s/ ROBERT C. PARTRIDGE,

/s/ LEO M. COOK,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 30, 1947.

[Title of District Court and Cause.]

DEPOSITION OF H. H. PIERSON

Be It Remembered, that on Tuesday, July 29, 1947, pursuant to stipulation of counsel, at the offices of Messrs. Brobeck, Phleger & Harrison, Suite 1100, 111 Sutter Building, in the City and County of San Francisco, State of California, personally appeared before me, Eugene Jones, Esq., a Notary Public in and for the City and County of San Francisco, State of California, authorized to administer oaths, etc.,

H. H. PIERSON

the plaintiff herein, called as a witness on behalf of the Defendants.

Robert Partridge, represented by Leo M. Cook, Jr., Esq., appeared as counsel for plaintiff; and

Messrs. Brobeck, Phleger & Harrison, represented by Alan B. Aldwell, Esq., appeared as counsel for defendants; and the said witness, having been by me first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the counsel for the respective parties that the deposition of the above named witness may be taken on behalf of the defendants at the offices of Messrs. Brobeck, Phleger & Harrison, Suite 1100, 111 Sutter Building, in the City and County of San Francisco, State of California, on Tuesday, July 29, 1947, before Eugene Jones, a notary public in and for the City and County of San Francisco, State of California, and in shorthand by Fred J. Sherry.

It is further stipulated and agreed by and between the counsel for the respective parties that the deposition, when transcribed into longhand typewriting, may be read into evidence by either party on the trial of the said cause; that all objections as to the notice of the time and place of taking the same are waived, and that all objections

(Deposition of H. H. Pierson.)

as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties for the time of trial.

It is further stipulated by and between counsel for the respective parties that the reading over of the testimony to or by the said witness and the signing thereof are expressly waived.

Mr. Aldwell: May we have the stipulation that the Notary can be excused?

Mr. Cook: Yes.

Mr. Aldwell: And also it is stipulated that all objections as to the sufficiency of the notice and so forth are waived?

Mr. Cook: Yes, with all the usual stipulations.

Mr. Aldwell: Yes.

Examination by Mr. Aldwell

Mr. Aldwell: Q. Mr. Pierson, will you state your full name and address, please?

A. My home address you want?

Q. Yes, and your business address.

A. Herman H. Pierson, 26 Elm Street, Larkspur.

Q. What is your business address?

A. My business address is 214 Front Street, San Francisco, care of the States Steamship Company.

Q. That is the States Steamship Company?

A. Yes, S-t-a-t-e-s Steamship Company.

Q. You are the plaintiff in this action?

(Deposition of H. H. Pierson.)

A. Yes.

Q. What is your present business connection, or in what capacity are you?

A. I am traffic manager.

Q. You are traffic manager of the States Steamship Company? A. Of San Francisco.

Q. Does that just cover San Francisco or any other area?

A. No, it would cover San Francisco. The main office is in Vancouver, Washington.

Q. What are your present duties in that connection, Mr. Pierson?

A. Operating the steamers, getting freight, etc., the usual procedure of a traffic manager's position.

Q. Are you in complete charge of the San Francisco office of that company?

A. No, they have a district manager in charge of the office.

Q. Now, you were formerly employed by the defendant, the De La Rama Steamship Co., Inc., in this particular action? A. Yes.

Q. When were you employed by that company?

A. It was July 1, 1940.

Q. Would you state the circumstances under which you were employed at that time, that is, who employed you and who made the negotiations?

A. I can give you the background. We formed a corporation called the De La Rama Steamship Agencies in February of 1939 and we had the California agency of the De La Rama Steamship

(Deposition of H. H. Pierson.)

Company which operated until June 30, 1940, when the De La Rama Steamship Company bought out the agency and took us in their employ—took me in their employ.

Q. When you say "we", whom do you mean?

A. When I say "we", I mean they took over the whole organiaztion, but that is not involved.

Q. But you say you formed a corporation.

A. I mean myself and associates formed a company.

Q. I see. So that in June of 1940 the present defendant in this action took over—

A. On July 1, 1940 it took over and bought out the old corporation, yes.

Q. Was anybody else besides yourself taken over by this organization?

A. All of the employees from the agency were taken over.

Q. When that occurred, whom did you deal with in connection with your employment?

A. A Mr. Piravno, the president of the De La Rama, and Mr. Suewer, the United States manager.

Q. At that time did you have any discussion with Mr. Piravno as to the terms of your employment? A. Do you mean as to salary?

Q. I mean as to salary and length of employment and so forth.

A. The whole company was taken over into their branch office, continued employment and all

(Deposition of H. H. Pierson.)

the salaries were discussed at that time as to what they would pay anybody.

Q. With particular reference to yourself, what discussion, if any, was had as to the matter of salary?

A. My monthly salary was discussed at the time and agreed to.

Q. What was that? A. $600.

Q. That is the same as you had been receiving?

A. No, that was more than I had been receiving.

Q. Was your capacity with the present defendant the same capacity as that which you had had under the previous arrangement?

A. I was president of the agency, but I was Pacific Coast manager when I went with the corporation.

Q. So that commencing July 1, 1940 you were Pacific Coast manager for the De La Rama Steamship Co.? A. Yes.

Q. And you continued in that capacity, did you, until you severed your connection with the defendant?

A. Well, there was a break in between. In March, I would say, of 1941, a Mr. Bradford came over from Manila and took charge of the Pacific Coast office as the No. 2 man of the De La Rama Steamship Co., United States, and he continued in that capacity until February of 1942 when he went in the war and then I took over as Pacific

(Deposition of H. H. Pierson.)

Coast manager; I mean, carried on from then on as Pacific Coast manager.

Q. What was your position between March 1941 and—

A. Pacific Coast manager—still carried out the same title.

Q. I see. When did you leave the employ of the defendant? A. August of 1946.

Q. Do you remember the date?

A. There are 31 days in August, so it was the 31st day of August.

Q. Would you state under what circumstances you left the employ of the defendant?

A. I was made another offer by a firm and accepted.

Q. Going back to your original employment of July 1, 1940, you made your arrangements for employment with Mr. Piravno, is that correct?

A. Yes.

Q. At $600 per month as Pacific Coast manager? A. Yes.

Q. Subsequent to that time, did you have any further discussions as to terms of employment with Mr. Piravno?

A. In just what respect do you mean—length of time?

Q. Particularly with regard to salary.

A. No, that question didn't arise. At the time the war came on, he was caught in Manila so there was no opportunity to talk to him. From then on

(Deposition of H. H. Pierson.)

Mr. Suewer took charge of the company, the United States.

Q. So that after the commencement of the war there was no further contact with the people in the Philippines? A. That's correct.

Q. That is, after such time as the Japanese took control and communications were severed?

A. That's right.

Q. And so from that time your dealings would be with Mr. Suewer, is that correct?

A. That is correct.

Q. Approximately what date would you say that was?

A. At the time the war started we were getting some cables through, but I would say it was late December of 1941 when we could not get through any more to Manila.

Q. Between July 1, 1940 and the time that the communications were severed with Manila, was there any change in your salary? A. No.

Q. When did you receive an adjustment in salary for the first time?

A. I think it was 1942. I have a record if you want the actual date of it.

Q. I would like to have it.

A. It was October 1, 1943.

Q. What happened at that time?

A. Increased to $708.33.

Q. Per month? A. Yes.

(Deposition of H. H. Pierson.)

Q. Under what circumstances was that raise in salary negotiated?

A. You mean how I obtained the increase?

Q. Yes.

A. I approached Suewer on the basis of increasing all salaries, including my own, because our pay situation was way below, and he authorized me to make certain adjustments in salary and I had to make out the forms and apply to various departments of the government to obtain the authority.

Q. Now, you did that after discussing it with Mr. Suewer, is that correct? A. Yes, sir.

Q. Where did that discussion take place?

A. In San Francisco.

Q. He authorized a raise in your pay to $708.33 per month?

A. Yes; that is, in other words, from $7200 to $8580.

Q. Did you have any more discussions with Mr. Suewer with regard to salary adjustment other than this period in October of 1943 and until the discussion as alleged in your complaint, February of 1944?

A. Yes, we had another discussion in which we got increased salaries again in 1945, in May.

Q. But there was nothing between October of 1943 and February of 1944?

A. No, not that I recall.

Q. Now, you allege in your complaint that in

(Deposition of H. H. Pierson.)

February of 1944 you had a discussion concerning all salaries with Mr. Suewer, is that correct?

A. Yes.

Q. What date in February of 1944 would that be?

A. I couldn't tell you the exact date. He was out on a trip from New York that month and we were discussing salaries in general, my own included, on the basis of the bonus and in comparison with other steamship salaries that were being paid.

Q. Will you state the substance of those discussions you had with Mr. Suewer in February of 1944?

A. He admitted our scale was under steamship companies, and something would have to be done about it. Otherwise we were going to make some moves to get some better positions and he realized at the time it was very difficult to get approvaals from the various government bodies and he decided that something would have to be done later in the form of taking care of them in some way after the war was over or when the shooting stopped anyway, so they could contact the home office. In the discussion I told him that some of our boys were going to move out unless they would get something in the form of increased salaries, in taking care of, especially, the higherups in the operating end of it, including myself. He figured at the time that adjustment could be made to take

(Deposition of H. H. Pierson.)

care of everybody that would come in that category. So we carried on.

Q. Did he at that time make any statement as to his authority to grant salary increases?

A. He had the authority to grant certain increases in salary and pay us the way he did, authorizing us to get increases. He had that authority but he said he didn't have any authority to grant any bonuses at that time.

Q. What was finally agreed between you as to bonus?

A. He had to take it up with the home office when Manila was liberated and the home office was in operation.

Q. What discussion was had at that time as to the amount of the bonus?

A. There was no actual amount mentioned on it other than what would be considered a fair bonus for the top men that had carried on through the war period at a low salary. There was no actual amount stipulated to.

Q. So he therefore agreed at that time to take the matter up with the people in Manila after Manila was liberated?

A. That's right. Well, he felt or he asserted that he knew that if he recommended certain increases or bonuses for the boys at work during the war period, he felt positive they would be granted.

Q. But there was no fixing of any amount?

A. No stipulation as to the amount at all and we trusted the boy.

(Deposition of H. H. Pierson.)

Q. At that time Mr. Suewer was the only officer of the corporation in the United States?

A. That's right; he had the full power of attorney that had been cabled over. Well, it was at he Philippine National Bank, New York at the time the Japs started the little blow-off, giving him full authority to operate the company and everything.

Q. After this discussion in February of 1944, did you have further discussion with Mr. Suewer regarding your salary?

A. I don't recall just when, but I know I brought the subject up on his different visits to San Francisco from New York, and in 1945 he granted authority to ask for additional increases for different employees in the office.

Q. Including yourself?

A. Including myself.

Q. What form did that take?

A. What do you mean?

Q. The amounts, and so forth.

A. I don't know about the other employees but I was raised $500 for a year, which made my salary $750 a month.

Q. About what time in 1945 was that?

A. May 1 was when it was granted. We got approval from the Treasury Department.

Q. Did you have any further discussions on the subject of salary or bonus after that date?

A. The discussion we had was in 1946, Febru-

(Deposition of H. H. Pierson.)

ary, when he was on his way to Manila and he promised at that time he would take up the question on the lines that he had promised to, and on his arrival back from Manila in March of 1946 at the Biltmore Hotel, I discussed it with him.

Q. That was the Biltmore Hotel in Los Angeles?

A. Yes, and he said he had discussed it out there with the officials and that they had approved the plan of paying a bonus to the men that were entitled to a bonus and that he was to work out the ones that were to receive bonuses and the amounts and submit them to Manila for approval.

Q. Did you at that time or at any other time thereafter discuss with him the amount of the bonus he should recommend for you?

A. I never discussed the amount because the way he always expressed it was that it would be a justifiable amount for the services performed.

Q. Then what happened after that particular meeting in March of 1946? What was the next development in so far as the payment of salary and bonus were concerned?

A. It was then I had made my decision to leave the firm. The actual date of leaving the firm was not known because at the time De La Rama had the agency of the States Steamship Company and I was to leave the firm when they could find offices and take over their own business. So I stayed with them until that time, which was the end of August,

(Deposition of H. H. Pierson.)

but I think it was in July of 1946 that Mr. Bradford came in on a Monday morning and waved a check at me. He gave me a bonus check and then I wrote Mr. Suewer a letter up at the Grove and told him I would appreciate it very much if he would give me the time on Sunday night when he was coming down to discuss the thing, but he avoided the thing and told Mr. Bradford who came into the office Monday after putting him on the plane for New York, that if I wanted to discuss the bonus I could write him a letter.

Q. Did you write him any such letter?

A. No, I should write.

Q. What did you do after that?

A. I went and talked to my attorney and asked him what to do with the check.

Q. What did he tell you to do?

Mr. Cook: You need not answer that question.

Mr. Aldwell: All right.

Q. As a matter of fact, as a result of your conversation with Mr. Partridge, your attorney, he wrote a letter to Mr. Suewer, did he not?

A. That's right.

Q. As a further result of that, De La Rama attorneys in New Your replied to Mr. Partridge's letter? A. I think he did, yes.

Q. Did Mr. Partridge ever show you the letter from Messrs Haight and Griffin?

A. I believe they sent me a copy.

Q. Do you recall the date on which you received that check?

(Deposition of H. H. Pierson.)

A. I couldn't tell you the actual date other than it was in the month of July, because he was up at the Bohemian Grove when they were having the Jinx up there.

Q. Mr. Bradford handed the check to you?

A. Yes.

Q. When did he return to the organization?

A. He returned on the 2nd of January 1946.

Q. In what capacity?

A. As No. 2 man, as he was before.

Q. In the United States? A. Yes.

Q. And your relationship was the same as it was before? A. Yes.

Q. And by that I mean it was the same as it was during the previous period before the war?

A. Yes.

Q. Did you have any discussion with Mr. Bradford when he handed you the check, or at any other time as to what the check represented?

A. No, sir.

Q. He just handed the check to you, is that correct? A. Yes.

Q. And as you already stated, you asked him to get in touch with Mr. Suewer?

A. I gave him a letter to give to Mr. Suewer. He was going up to the Grove.

Q. And that was the letter requesting Mr. Suewer to meet you on Sunday night?

A. That's right.

Q. And he was going to leave on Monday morning for New York? A. That's right.

Q. That was all there was in that letter?

(Deposition of H. H. Pierson.)

A. That is all there was in that letter.

Q. What did you do with the check when you got it?

A. I held on to it until I consulted my attorney.

Q. Then after that what did you do?

A. On his authority I deposited it.

Q. Do you recall whether you deposited it right after you talked to Mr. Partridge?

A. I don't just exactly know whether it was the same day or not.

Mr. Cook: The original check would be the best evidence. I imagine you have that.

The Witness: I don't know what day I put it in the bank. The day I consulted Partridge, why, I talked to Bob about it, but I think he studied it over for a while, if I remember correctly, and called me in a couple of days later and we had a further discussion and he told me I could deposit the check and he wrote a letter. I think that's the way it was.

Mr. Aldwell: Q. Let me ask you this, and this will accomplish my purpose: Did you deposit the check in your account before you saw the copy of the letter in reply from Messrs. Haight & Griffin?

A. Oh, yes.

Q. That is all I wanted to know. Would you give us a brief discussion of your duties as Pacific Coast manager for De La Rama during this period of time?

A. The duties at the time— As I say, the Pacific Coast manager is to look after the operation of the Los Angeles and San Francisco offices and take

(Deposition of H. H. Pierson.)

full charge of all the operations of all of our vessels plus vessels belonging to the United States over which De La Rama was the general agent. Also as the agent for the States Steamship Company in handling their business operations at both Los Angeles and San Francisco.

Q. How many people did you have in the office here in San Francisco that you supervised, approximately?

A. I think I had about 22 in San Francisco and there was, let's see, about 10 in Los Angeles and Long Beach.

Q. And they were all under your supervision, is that correct? A. Yes, sir.

Q. Your capacity as Pacific Coast manager, you were, of course, under Mr. Suewer's directions?

A. Correct.

Q. He being the vice president in New York?

A. That's right.

Q. In that capacity how much discretion did you have with regard to, I will say, hiring and firing employees out here?

A. I had full authority.

Q. You didn't have to consult New York at all?

A. No. If I was going to hire anybody or increase the staff and needed somebody, I would talk it over with him over the phone.

Q. But I mean so far as any replacements were concerned.

A. Oh, no, not as far as any replacements were concerned, except I would just state that So-and-

(Deposition of H. H. Pierson.)

so resigned and So-and-so was hired, and get the necessary bonds and regular routine you have to go through and then notify them of the facts.

Q. Going back to this discussion with Mr. Suewer in February of 1944, where did this conversation take place? In the office here?

A. Yes.

Q. Was there anybody else present?

A. No, just the two of us.

Q. Was there any memorandum made of that discussion by either party so far as you know?

A. I did not—I don't know whether he did or not.

Q. I say so far as you know. A. No.

Q. Was there any statement made by either Mr. Bradford or by Mr. Suewer or by anybody for that matter, when you received this check for $2500 less taxes, that that was to be considered full payment as a bonus?

A. There was not even a word said. He just waved it like that with glee. He thought he was doing something wonderful for me. I don't think my expression can really express it.

Q. When you had this discussion with Mr. Suewer in February of 1944, did you say anything to him at that time about resigning?

A. I told him that we were going to lose some of our boys if we didn't get something, that we would all be looking for new jobs.

Q. How about yourself personally?

A. Including myself.

(Deposition of H. H. Pierson.)

Q. Did you actually threaten to resign at that time unless you got some commitment?

A. I told him we would have to make some other arrangements if we didn't get some commitment.

Q. When you had concluded this discussion with Mr. Suewer at that time, did you feel that you had a binding contract with the corporation?

Mr. Cook: Pardon me, but you need not answer that question. That calls for a legal conclusion.

Mr. Aldwell: I think that should be reserved for later.

Mr. Cook: It is a matter of form. That is up to the judge anyway.

Mr. Aldwell: That is what I say, but he ought to answer it at any rate so we can put it up to the judge. However, I am willing to let it go.

Q. Had you been receiving many offers from other steamship companies around February of 1944?

A. I was not receiving any offers. I had discussions with other steamship people, new firms coming out opening offices that approached me about whether I was satisfied, and so forth. They were looking for men.

Q. Did you ever get to the point where you had any discussion as to possible salary if you went with those companies?

A. I never got that far along in a conversation.

Q. When were communications restored with the Philippines?

A. I imagine it was—This is only a guess on my part. I haven't the actual date, but I imagine

(Deposition of H. H. Pierson.)

it was in March of 1945—somewhere around that time.

Q. From that time on it was possible to get instructions as to the management of the company from the head office in Manila?

A. Yes, when they got Manila organized.

Q. Now, you allege in your complaint that the salary being paid to you, "in or about February of 1944 was less than the reasonable value of your services and less than the salary paid to other persons holding comparable positions and performing comparable duties with other and similar steamship companies," is that correct? A. Yes.

Q. Upon what do you base that allegation?

A. On knowing about salaries that other people enjoyed in a similar capacity?

Q. What were those salaries?

A. I would say a minimum of $1000 a month, and some higher, naturally.

Q. Can you state any particular company that would be true of, that was comparable?

A. Yes, I would imagine that the Steamship Department of Balfour Guthrie would be comparable. I would imagine that the same would be true of Fred Olson Line, for their Pacific Coast manager. And there are many others.

Q. Do you know for a fact what salaries the Pacific Coast managers of those two particular concerns were getting?

A. I am not positive of their salaries, no; but I am positive they were higher than $1000 a month.

Q. Do you know what if any arrangements their

(Deposition of H. H. Pierson.)

Pacific Coast managers might have had with their companies as to bonuses and so forth at the end of the war, if any?

A. No, I couldn't say as to that.

Q. When the actual fighting stopped in August of 1945 did you discuss this matter of bonus with Mr. Suewer at any time between then and this time in February of 1946 when he was on his way to Manila?

A. Yes, on the different times when he was out here it was discussed.

Q. What was the general subject of the discussion?

A. He said he had the similar thought that as he assured me before it would be taken care of as soon as Manila was opened up again.

Q. There was no discussion of amounts or anything? A. No.

Q. Did you make any approaches to any other steamship companies with regard to employment, say, from the fall of 1943, on?

A. I was approached, but I didn't approach.

Mr. Aldwell: I think that is all I have.

Mr. Cook: No questions.

State of California,
City and County of San Francisco—ss.

I, Eugene Jones, a notary public in and for the City and County of San Francisco, State of California, hereby certify that, pursuant to stipulation of counsel, the witness in the foregoing deposition named, H. H. Pierson, was by me duly sworn

to testify the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and place therein named; that said deposition was reported in shorthand by Fred J. Sherry, a competent shorthand reporter and disinterested person, and was transcribed by him into longhand typewriting; and that the reading and subscribing of the said deposition by the witness was duly waived by the attorneys for the respective parties.

And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In witness whereof, I have hereunto set my hand and affixed my official seal this 12th day of August, 1947.

(Seal) /s/ EUGENE P. JONES,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 30, 1947.

[Endorsed]: No. 12050. United States Court of Appeals for the Ninth Circuit. The De La Rama Steamship Co., Inc., a corporation, Appellant, vs. H. H. Pierson, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 28, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12050

H. H. PIERSON,

Plaintiff and Appellee,

vs.

De La RAMA STEAMSHIP CO., INC., a corporation, FIRST DOE, SECOND DOE, THIRD DOE,

Defendants;

THE DE LA LAMA STEAMSHIP CO., INC.,

Defendant and Appellant.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The De La Rama Steamship Co., Inc., Appellant herein, designates the following points upon which it intends to rely on the appeal in the above entitled cause:

1. The District Court erred in finding that at all of the times mentioned in the Findings of Fact and Conclusions of Law, R. F. Suewer "was acting within the course and scope of his authority" as United States General Manager of defendant The De La Rama Steamship Co., Inc. (Finding No. 4.)

2. The District Court erred in finding that at all of the times mentioned in the Findings of Fact and Conclusions of Law, "R. F. Suewer as United States Manager for said defendant had authority

to hire and discharge employees, including the plaintiff." (Finding No. 4.)

3. The District Court erred in finding that R. F. Suewer "represented, stated and promised to plaintiff that at the conclusion of the war the said Suewer would recommend to the Board of Directors that such additional sum of money or bonus be paid to plaintiff by defendant, which together with the salary and bonuses received by plaintiff during the war would equal the reasonable value of the services performed by plaintiff for defendant during the period of warfare." (Finding No. 4.)

4. The District Court erred in finding that "it is true that in the course of the conversation referred to, defendant corporation entered into an agreement with plaintiff in February of 1944, whereby plaintiff was hired by defendant from said time to the termination of the war, and that under and by virtue of the terms of the agreement of hiring, the total salary or compensation to be paid by defendant to plaintiff for his services from December 7, 1941 to August 14, 1945, the period during which actual warfare continued, was the reasonable value of plaintiff's services during such war period. Such additional compensation, salary or bonus, as together with the salary and bonuses received by plaintiff during the war would equal the reasonable value of the services performed by plaintiff for defendant during the period of warfare was payable by defendant to plaintiff within a reasonable time after the termination of the war." (Finding No. 5.)

5. The District Court erred in finding that "Plaintiff continued in his position as Pacific Coast Manager for defendant until after August 14, 1945, believing and relying upon the promises, representations and statements made to him by defendant corporation through the said Suewer and pursuant to the contract of hiring entered into as hereinbefore found, and defendant accepted and retained the benefit of the services of said plaintiff rendered on its behalf." (Finding No. 6.)

6. The District Court erred in finding that "the reasonable value of the services performed by plaintiff for defendant during the period from December 7, 1941 to August 14, 1945 . . . was and is the sum of $44,250.00" and that "there is now due, owing and unpaid by defendant to plaintiff as and for the balance due him for the reasonable value of his services during said period the sum of $9,650.00." (Finding No. 7.)

7. The District Court erred in finding that the sum of $2,500.00, together with the salary and bonuses he had received during the period of warfare . . . was less than the reasonable value of plaintiff's services for defendant during said period; the said Suewer did not recommend to the Board of Directors of said Defendant that a bonus be paid by defendant to plaintiff which, together with the bonus, compensation and salary received by plaintiff from defendant during the period of actual warfare . . . would equal the reasonable value of the services rendered by plaintiff to the defendant." (Finding No. 8.)

8. The District Court erred in finding that the "defendant became indebted to plaintiff in the sum of $9,650.00." (Finding No. 9.)

9. The District Court erred in finding that "no approval . . . from the Salary Stabilization Unit of the Treasury Department . . . was necessary or required for the payment of the additional compensation due plaintiff . . ." (Finding No. 11.)

10. The District Court erred in finding that "The additional compensation promised and agreed to be paid to plaintiff by defendant was payable under the terms of said contract of hiring only after and upon the termination of wage and salary controls during the period of warfare, as established and prescribed by the Act of Congress known as the Stabilization Act of 1942 (50 U.S.C. App. Sec. 961-7) and the regulations lawfully promulgated thereunder by the Economic Stabilization Director and the Commissioner of Internal Revenue of the Treasury Department of the United States, and said Act and the regulations thereunder did not and do not prohibit the payment of said additional compensation to plaintiff." (Finding No 11.)

11. The District Court erred in vacating and setting aside the judgment theretofore rendered in favor of defendant on February 14, 1948.

12. The District Court erred in concluding that said judgment was "against and contrary to the law and the evidence." (Conclusion No. 2.)

13. The District Court erred in concluding that "defendant is indebted to plaintiff for the reasonable value of services rendered upon a contract

of hiring in the sum of $9,650.00." (Conclusion No. 3.)

14. The District Court erred in concluding that "plaintiff is entitled to judgment against defendant in the sum of $9,650.00." (Conclusion No. 4.)

15. The District Court erred in not finding and concluding that there was no liability, either contractual or otherwise, on the part of defendant to pay plaintiff any sum whatsoever as a bonus.

16. The District Court erred in not finding and concluding that in the event there was a contract on the part of the defendant to pay plaintiff additional compensation, it was fully performed by the payment by defendant of $2,500.00 on July 15, 1946.

17. The District Court erred in not concluding that in the event there was a contract on the part of defendant to pay plaintiff additional compensation, it was illegal and void under the Stabilization Act of 1942 and the regulations promulgated thereunder.

18. The District Court erred in failing to enter judgment for the defendant herein.

Dated: September 28, 1948.

/s/ HERMAN PHLEGER,
/s/ MAURICE E. HARRISON,
/s/ ALAN B. ALDWELL,
/s/ BROBECK, PHLEGER & HARRISON,

Attorneys for Appellant The De La Rama Steamship Co., Inc.

[Endorsed]: Filed September 28, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION DESIGNATING PORTIONS OF RECORD ON APPEAL TO BE INCLUDED IN PRINTED RECORD ON APPEAL

It Is Hereby Stipulated and Agreed that the entire record on appeal as transmitted by the District Court shall be included in the printed record on appeal in the above entitled cause, together with appellant's Statement of Points Upon Which Appellant Intends to Rely on Appeal and this Stipulation.

Dated September 28, 1948.

/s/ HERMAN PHLEGER,
/s/ MAURICE E. HARRISON,
/s/ ALAN B. ALDWELL,
/s/ BROBECK, PHLEGER & HARRISON,

Attorneys for Defendant and Appellant, The De La Steamship Co., Inc.

/s/ ROBERT G. PARTRIDGE,
Attorney for Plaintiff and Appellee.

[Endorsed]: Filed September 28, 1948. Paul P. O'Brien, Clerk.

No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC., a corporation,

Appellant,

vs.

H. H. PIERSON,

Appellee.

APPELLANT'S OPENING BRIEF

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Subject Index

Page

A. Statement Regarding Jurisdiction 1

B. Statement of the Case 3

C. Specifications of Error 11

I. Preliminary Analysis 12

A. Appellant's Contentions 12

B. Summary Statement of the Principles Applicable to Appellate Review of Findings in a Non-Jury Case 13

1. The Scope of Appellate Review Is in Accord With the Federal Equity Practice 14

2. Where the Evidence Consists of Depositions, Documents or Undisputed Matters, the Trial Court's Finding Is Entitled to Only Slight Weight 15

3. Findings Which Are Conclusions or Inferences Drawn from the Evidentiary Facts Are Entitled to Only Slight Weight 16

II. The Conversation of February 1944 16

III. The Conversation of February 1944 Did Not Create a Contract of Employment 23

A. The Contract Found by the Trial Court Is Inconsistent With the Finding of Evidentiary Facts 25

B. There Was No Intent to Contract 25

IV. There Is No Basis in the Evidence for the Finding That the Contract of Employment Involved a Retroactive Adjustment in Pay 26

V. The Trial Court Erred in Finding the Reasonable Value of Appellee's Services 28

Page

VI. The Defense of Illegality 30

A. The Contract, if One Was Made, Was for Payment at an Ascertainable Future Date Irrespective of the Termination of Wage Controls 31

B. A Contract to Pay an Additional Sum at the Termination of Actual Combat Warfare Is Illegal and Void .. 32

C. An Agreement to Pay an Additional Sum After Termination of Salary Controls Is Unenforceable 35

Conclusion 38

Table of Authorities Cited

CASES

Pages

Aetna Life Insurance Co. v. Kepler (8 Cir. 1941) 116 F.2d 1, 4-5 14

Del Re v. Frumkes (Supreme Court, 1948) 81 N.Y.S. 2d 97.... 33

Equitable Life Assurance Society v. Irelan (9 Cir. 1941) 123 F.2d 462, 464 ..... 14, 15

Fitzsimons v. Eagle Brewing Co. (3 Cir. 1939) 107 F.2d 712, 126 A.L.R. 681 34

Fleming v. Palmer (1 Cir. 1941) 123 F.2d 749, 751..... 14, 15

Himmel Bros. Co. v. Serrick Corp. (7 Cir. 1941) 122 F.2d 740, 742 ..... 15, 16

Home Indemnity Co. v. Standard Accident Insurance Co. (9 Cir. 1948) 167 F.2d 919, 923..... 15, 16

Kells v. Boutross (Supreme Court, 1945) 53 N.Y.S. 2d 734..... 35

Kuhn v. Princess Lida of Thurn & Taxis (3 Cir. 1941) 119 F.2d 704, 705-6 ..... 16, 29

Murray v. Noblesville Milling Co. (7 Cir. 1942) 131 F.2d 470, 475 16

National Motor Bearing Co. Inc. v. Chanslor & Lyon Co. (9 Cir. 1948) 167 F.2d 1001..... 15

Palmisano v. United States Brewing Co. (10 Cir. 1942) 131 F.2d 272 34

In re Pringle Engineering & Mfg. Co. (7 Cir. 1947) 164 F.2d 299 34

Smith v. Bach, 183 Cal. 259, 191 Pac. 14..... 34

State Farm Mutual Automobile Insurance Co. v. Bonacci (8 Cir. 1940) 111 F.2d 412, 415..... 14, 15

United States v. Anderson (7 Cir. 1939) 108 F.2d 475, 478-479.. 16

United States v. Armature Rewinding Co. (8 Cir. 1942) 124 F.2d 589, 591 16

United States v. U. S. Gypsum Co., 333 U.S. 364, 394-5, 92 L.Ed. (Adv. Op.) 552, 68 S.Ct. 525..... 14

Pages

Wernhardt v. Koenig (E.D. Pa. 1945) 60 F. Supp. 709 33
Western Union Telegraph Co. v. Bromberg (9 Cir. 1944) 143 F.2d 288 ..... 15, 16
Willcox v. Edwards, 162 Cal. 455, 461, 123 Pac. 276 34

STATUTES

California Civil Code:
Section 1550 34
Section 1550 (3) 37
Section 1611 27
Section 1667 ..... 34, 37

29 Code of Federal Regulation, Part 1002.10 33

Executive Order 9250 33

Executive Order 9599 33

Federal Rules of Civil Procedure:
Rule 52(a) 14

Stabilization Act of 1942 (56 Stat. 765, 50 U.S.C. App. Sec. 961 et seq.) 32

United States Code:
28 U.S.C. Sec. 41 2
28 U.S.C. Sec. 71 2
28 U.S.C. Sec. 225 3

TREATISES

100 A.L.R. 969 24

126 A.L.R. 685 34

6 Cal. Jur. p. 104 38

3 Moore's Federal Practice, p. 3118 14

Rest. of Contracts, Sec. 609 34

Simkins' Federal Practice (3rd Ed.) p. 488 14

6 Williston (Rev. Ed.) Sec. 1758 34

No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC., a corporation,

Appellant,

vs.

H. H. PIERSON,

Appellee.

APPELLANT'S OPENING BRIEF

A. STATEMENT REGARDING JURISDICTION

Appellant, The De La Rama Steamship Co., Inc., takes this appeal from a judgment of the United States District Court for the Northern District of California awarding judgment to the appellee, H. H. Pierson, in the sum of $9,650.

The appellee filed suit in the Superior Court of the State of California in and for the City and County of San Francisco on December 18, 1946, seeking additional compensation for services rendered to appellant during the war period, December 7, 1941 to August 14, 1945 (Tr. 2-6).[1] That action was one at law

1. References to the Transcript of Record on Appeal are indicated as follows: "(Tr. ....)".
Emphasis, throughout this brief, is ours unless otherwise indicated.

a civil nature and the amount in controversy exceeded the sum of $3,000, exclusive of interest and costs. Appellee, plaintiff below, was a resident and citizen of the State of California. Appellant, defendant below, was a corporation organized and existing under the laws of the Republic of the Philippines. The District Court would have had original jurisdiction of such an action (28 U.S.C. Sec. 41) and it was within the removal statute (28 U.S.C. Sec. 71). Accordingly, appellant filed a petition for removal to the United States District Court on December 31, 1946 (Tr. 6-9), and an order granting the petition was made and filed January 2, 1947 (Tr. 9-10). Pleadings showing the jurisdiction of the District Court are set forth in the petition for removal (Tr. 6-9).

Thereafter, the case came on for a non-jury trial and on December 18, 1947, the Trial Judge made an order for judgment for appellant on the ground that there was no evidence of contractual liability (Tr. 16-17). On February 6, 1948, the Trial Judge made and filed Findings of Fact and Conclusions of Law (Tr. 17-21) and on February 13, 1948, entered judgment for appellant (Tr. 22-23).

On February 20, 1948, appellee moved that the court grant a new trial or vacate the findings and judgment and enter judgment in favor of appellee (Tr. 23-24). On June 9, 1948, the Trial Judge set aside the judgment theretofore entered in favor of appellant and directed entry of a new judgment in favor of appellee (Tr. 24-25). Pursuant to that order, new Findings of Fact and Conclusions of Law were made on June 21, 1948 (Tr. 25-32), and on June 28, 1948 judgment was entered for appellee in the sum of $9,650 and costs in the amount of $26.90 (Tr. 33-34).

On July 8, 1948 within thirty days after entry of judgment for the appellee, appellant filed a notice of appeal (Tr. 34-35).

This Court has jurisdiction of the appeal. 28 U.S.C., Sec. 225 (a) and (d). Appellant filed a designation of the contents of the Record on Appeal on July 9, 1948 (Tr. 36-37), which was amended by an order pursuant to stipulation on September 16, 1948 (Tr. 37-38). By order of the District Court the time within which the Record on Appeal must be filed was extended to September 30, 1948 (Tr. 35-36).

On September 28, 1948, the Transcript of Record on Appeal was certified by the Clerk of the District Court (Tr. 38-39) and filed on the same day with the Clerk of this Court (Tr. 221). On September 28, 1948, appellant filed a statement of points to be relied upon in this appeal (Tr. 222-226) and on the same day a stipulation was filed designating the portion of the record to be included in the printed Record on Appeal (Tr. 227).

B. STATEMENT OF THE CASE

This case involves the existence, terms and validity of a contract of employment found by the Trial Court to have resulted from certain conversations in February 1944, between appellee and Mr. Suewer, the United States Manager for appellant. In that month Mr. Suewar stated (in substance) to appellee, who was employed as appellant's Pacific Coast Manager, that after the war he would recommend to appellant's Board of Directors that bonuses be paid to the key men, including appellee. From that conversation the Trial Court deduced the existence of a new contract of employment whereby appellee was hired from that date to the termination of the war,[2] and in which the agreed compensation was to be the reasonable value of appellee's services, *not from the date of the new hiring, but from December 7, 1941* to the termination of the war. The Trial Court found

2. Plaintiff alleged (Tr. 5) and defendant admittted (Tr. 13) that actual combat warfare ceased August 14, 1945; hence, for the purposes of this case, that date is to be taken as the end of the war.

that the reasonable value of appellee's services during this period was $44,250, which was $9,650 in excess of the amount paid. The Trial Court also found as a "fact" that the Stabilization Act of 1942 (50 U.S.C. App. Sec. 961 et seq.), and the regulations issued thereunder, did not prohibit enforcement of this contract.

It is apparent from the foregoing that this appeal turns upon the validity of certain findings of the Trial Court. We think that some of these findings are not properly designated "Findings of Fact"—that they are conclusions of law, or at most, findings of "ultimate fact."

As a background to the conversation of February 1944, we set forth the relationship of the parties and outline what was said and done about compensation.

Prior to the war, appellant, a Philippine corporation, operated a shipping line from the Philippines and other Oriental ports to the Atlantic and Pacific Coasts. In February 1939 appellee, together with a Mr. Bradford, organized a corporation called The De La Rama Steamship Agencies, which acted as the California agency for appellant's shipping business. On June 30, 1940 appellant bought out the agency and, commencing on July 1, 1940, employed appellee as its Pacific Coast Manager at a salary of $600 per month (Tr. 51-52, 203-204). It was more than he had been earning previously (Tr. 205). Appellee remained in that position at varying rates of pay throughout his employment, which terminated August 31, 1946 (Tr. 162).

To service its shipping business in the United States after July 1, 1940, appellant maintained an organization in this country headed by Mr. Robert F. Suewer, who then held the title of United States Manager. The organization under Mr. Suewer included a New York office in charge of Mr. Griffin. On the West Coast there were offices at Los Angeles (including a "dock office" at Long Beach) and San Francisco, both in charge of appellee. In March 1941, Mr. Bradford was sent from

appellant's home office at Manila and became Assistant United States Manager under Mr. Suewer. Mr. Bradford took charge of the Pacific Coast business, and until he went into the Army Transport Service in February 1942, appellee, although retaining the title of Pacific Coast Manager, acted under his immediate supervision. Thereafter Mr. Griffin, head of the New York office, became second in command of the United States organization, and appellee was subject to his directions as well as those of Mr. Suewer (Tr. 123-125).

The nature of appellee's duties and functions prior to the war is not shown by the Record in any great detail. It appears, however, that they were of the sort typical of a steamship agent and concerned with looking after ships in port and booking cargoes.

Shortly after the outbreak of war in December 1941, communications with appellant's home office in Manila were cut off. From that time until communications were restored in the latter part of 1945, Mr. Suewer managed appellant's United States organization under a wartime power of attorney (Tr. 128), which was released to him by the Philippine National Bank of New York (Tr. 160).

This court has judicial knowledge that the war completely disrupted commercial shipping in the Trans-Pacific service where appellant operated. Appellant's three ocean going vessels were requisitioned by the Maritime Commission (Tr. 164) and a decided lull in activity followed while Mr. Suewer sought a new field of operation to hold the organization together (Tr. 41, 164-165). During 1942 nobody was discharged, but on the other hand, no effort was made to retain the services of any who wanted to leave (Tr. 165). As a foreign corporation, appellant was not at first eligible for a Maritime Commission general agency, but in the latter part of 1942, Mr. Suewer succeeded in getting an agency contract from the War Shipping Administration (Tr. 58, 164). The first vessels were received, pursuant

to the agency agreement, early in 1943, and from that time until the end of the war appellant's United States organization operated almost exclusively for the War Shipping Administration (Tr. 164-165).

Under the agency contract the pace of appellant's activity, like that of all shipping companies, increased substantially over prewar levels (Tr. 76). Appellee's duties and responsibilities during this period were somewhat different in kind, but greater in amount (Tr. 64-65). The number of employees under his jurisdiction increased from a prewar level of 12-15 to a wartime peak of 30-35 (Tr. 61).

The first discussion of appellee's salary came early in 1943. Up to that time appellee had been earning $600 per month in accordance with the terms of his initial employment on July 1, 1940. In addition, he had received a Christmas bonus each year in the amount of one month's salary. Similar bonuses were paid throughout appellee's employment (Tr. 52-53).

Early in 1943, appellee approached Mr. Suewer, who was then in San Francisco, and asked for an increase in his own salary and that of other employees under his supervision. Mr. Suewer agreed to an increase for all concerned, including an increase for appellee from $600 to $708.33 per month, and authorized appellee to apply to the Salary Stabilization Unit for approval (Tr. 207, 179, 180). Appellee filed an application with the Salary Stabilization Unit of the Treasury Department (Tr. 66) on April 8, 1943. The application was rejected by the Regional Office (Tr. 110) and appellee appealed the decision, giving further reasons to justify the increase (Tr. 110-118). The application was granted in October 1943, and was effective as of the date of application on April 8, 1943 (Tr. 79).

There was no further discussion of salary until February 1944 (Tr. 208). In that month, Mr. Suewer was again in San Francisco and the conversations with which this case is particularly concerned took place there. There were no witnesses

and no memoranda were made by either party (Tr. 168, 217). The testimony of appellee and Mr. Suewer is in conflict about some details of that conversation. The Trial Court in amended Finding of Fact No. 4 found that

> "During the month of February, 1944, plaintiff and said Suewer engaged in conversations in the course of which the said Suewer represented, stated and promised to plaintiff * * * (L.E.G.—D.J.) that at the conclusion of the war the said Suewer would recommend to the Board of Directors that such additional sum of money or bonus be paid to plaintiff by defendant, which together with the salary and bonuses received by plaintiff during the war would equal the reasonable value of the services performed by plaintiff for defendant during the period of warfare." (Tr. 28)

We challenge that finding insofar as it includes a finding that the amount of the bonus to be recommended would be based upon the reasonable value of appellee's services.

The Trial Court originally concluded, on a substantially identical finding (Tr. 18), that no contract had been made. After motion for a new trial the judge changed his mind and, on the same evidentiary facts, concluded that a contract had been made (Tr. 24-25) and proceeded to detail its terms in what purport to be findings of fact (Tr. 29).

We contend that, even assuming the evidentiary finding to be correct, no contract was created and certainly not the contract which the Trial Court found.

No approval was sought or obtained from the Salary Stabilization Unit of the Treasury Department. The Trial Court purported to find as a "fact" that none was required and that the Stabilization Act of 1942 (50 U.S.C. App. Secs. 961 et seq.) and the regulations issued thereunder did not prohibit enforcement of the contract (Finding No. 11; Tr. 31).

We contend that this finding, which is purely a matter of law involving the interpretation of the statute, is erroneous.

Early in 1945, Mr. Suewer again approved a raise in pay for appellee; this time from $708.33 to $750 per month. Appellee again handled the application to the Salary Stabilization Unit (Tr. 75, 80). That application was granted effective March 16, 1945. There was no further change in appellee's rate of compensation during his employment. Thus he received $600 per month from the commencement of his employment (on July 1, 1940) to April 8, 1943; $708.33 to March 16, 1945; and $750 thereafter until the termination of his employment on August 31, 1946. In addition, appellee received a Christmas bonus each year in the amount of one month's salary. In addition he received $2,500 in July 1946, as the bonus paid in response to the recommendation of Mr. Suewer made in accordance with the conversation in February 1944.

After communications to the Philippines were restored, Mr. Suewer returned to the home office in Manila, in February 1946, to report to the directors. While there, he recommended to the directors that some of the key men in the United States organization should be paid an additional bonus. The Board requested Mr. Suewer to recommend the names of the persons who should receive such bonuses and the respective amounts. Upon his return to the United States, Mr. Suewer recommended bonuses for several key employees, including appellee. Appellant's Board of Directors approved these recommendations and appellee received payment of $2,500 in July 1946 (Tr. 172, 189-192).

With respect to the bonus paid to appellee, Mr. Suewer testified that it was arrived at on the assumption that an additional bonus of approximately $500 a year during the war period would be appropriate in his case and finally came to a round figure of $2,500 (Tr. 173, 194). Mr. Suewer also testified that

the amount of his recommendation was based solely upon his judgment of the merit of the individual employee (Tr. 196-197).

On December 18, 1946, appellee brought this action, setting forth in his complaint two causes of action. First, that Mr. Suewer had promised appellee that appellant would, within a reasonable time after termination of warfare, pay appellee a bonus which, together with the salary received by him from December 7, 1941 to the termination of actual warfare, would equal the salary paid to other persons holding comparable positions and performing comparable duties in similar steamship companies. Appellee further alleged that the amount being paid for comparable work during the period from December 7, 1941 to August 14, 1945, was $1,000 a month and demanded the difference between what he actually received and what he would have received at the rate of $1,000 a month.

In the second cause of action, appellee alleged that by reason of the matters alleged in the first cause of action, appellant became indebted to appellee for the reasonable value of appellee's services during the period from December 7, 1941 to August 14, 1945.

At the trial of this action, there was a conflict in the testimony about appellee's efficiency (Tr. 163-164, 195, 93, 104). The Trial Court made no finding of fact with respect to this matter.

Appellee sought to prove the rate of compensation paid during the war period by other steamship companies for comparable positions (Tr. 96-99, 107). The evidence offered was rejected by the Trial Court (Tr. 98-99, 107) but subsequently motions were made to reconsider these rulings (Tr. 141). The Trial Court took them under advisement (Tr. 142) but, apparently, never decided them. The Trial Court made no finding about comparable salaries.

Appellee also sought to prove the reasonable value of his services. Here, too, there is uncertainty about what testimony was stricken (Tr. 95, 141-142) and the testimony was conflicting. The Trial Court found that the reasonable value of appellee's services for the period December 7, 1941 to August 14, 1945 was $44,250 (Tr. 30). This sum was a computation based upon $1,000 per month (Tr. 20, 140).

We challenge this finding particularly as applied to the period prior to early 1943 when appellant's business activity was at a low ebb.

After the trial of this action the Trial Court ordered judgment for appellant, stating that there was no evidence of contractual liability (Tr. 16-17). It is significant that the *evidentiary facts* originally found—what was said in the conversation of February 1944—were substantially identical with those found in the Amended Findings of Fact (Tr. 18 and 28). The Trial Court originally concluded that the evidentiary facts did not establish a contract (Tr. 21) and gave judgment for appellant (Tr. 22). After motion for a new trial, the Trial Court reached a different conclusion based on the same facts. That this was merely a change in the conclusion of law, rather than the fact, is indicated by the text of the order vacating the judgment where the court said:

> "The legal effect of the understanding between plaintiff and defendant's United States Manager was that plaintiff would continue in defendant's employ at a salary or compensation to be later fixed. This was tantamount to a hiring at an undertermined salary equivalent at least to the reasonable value of plaintiff's services. § 1611 California Civil Code.
>
> "A finding to this effect should be included in the findings of fact." (Tr. 25).

Thereafter the Trial Judge purported to find as a "fact" that the conversation resulted in a contract (Finding No. 5; Tr. 29).

C. SPECIFICATIONS OF ERROR[3]

Appellant contends:

1. The District Court erred in finding that Mr. Suewer's statements to appellee about the bonus which he would recommend to the Board of Directors included the representation that the amount of the bonus would be based upon the reasonable value of the services performed by appellee during the period of warfare (Finding No. 4; Tr. 28-29).

2. The District Court erred in making what purports to be a "finding of fact" that the conversation found in Finding No. 4 to have occurred, resulted in a contract of hiring from February 1944 to August 14, 1945 at the reasonable value of appellee's services from December 7, 1941 to August 14, 1945 (Finding No. 5; Tr. 29).

3. The District Court erred in finding that the reasonable value of appellee's services for the period December 7, 1941 to August 14, 1945 was $44,250 (Finding No. 7; Tr. 29-30).

4. The District Court erred in making what purports to be a "finding of fact" that pursuant to the terms of the contract found to exist, the additional compensation was payable only after and upon the termination of wage and salary controls (Finding No. 11; Tr. 31).

5. The District Court erred in making what purports to be a "finding of fact" that the payment of the additional compensation found to be due and payable under the contract

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3. For convenience we have summarized the technical Statement of Points Upon Which Appellants Intend to Rely on Appeal in the generalized specifications of error set forth in this section. The Statement of Points to Be Relied Upon are correlated with the Specifications as follows: Specification 1 above includes Point 3; Specification 2 includes Points 4 and 5; Specification 3 includes Points 6, 7 and 8; Specification 4 includes part of Point 10; Specification 5 includes Points 9, 10 and 17; Specification 6 includes Points 11, 12, 13, 14, 15, 16 and 18.

Appellant abandons Points 1 and 2 relating to the authority of Mr. Suewer.

found was not prohibited by the Stabilization Act of 1942 (50 U.S.C., App. 961 et seq.) and the regulations promulgated thereunder (Finding No. 11; Tr. 31).

6. The District Court erred in concluding that the judgment theretofore entered for appellant should be set aside and judgment should be entered for appellee (Conclusion Nos. 2 and 3; Tr. 32).

I. PRELIMINARY ANALYSIS

A. Appellant's Contentions.

As an introduction to the discussion which follows, we summarize here appellant's position on this appeal.

1. In the course of the conversation of February 1944 between appellee and Mr. Suewer, Mr. Suewer did promise to recommend a bonus for the key men including appellee, but it is not true that he stated that his recommendation would be based on salaries paid by other steamship companies for comparable positions (as testified by appellee), nor did he state that the basis would be the reasonable value of appellee's services during the war-time period (as found by the Trial Court in Finding No. 4).

If this Court agrees with our contention that Finding No. 4 is "clearly erroneous," the judgment must be reversed on that ground alone, since the critical findings and conclusions stem from this finding of what was said in the conversation of February 1944. The remaining points argued in this brief are directed to the contention that if Finding No. 4 is sustained, it does not support the conclusions drawn from it.

2. The conversation found in Finding No. 4 does not support the conclusion, erroneously expressed as "Finding of Fact" No. 5, that a contract of employment was thereby entered into, particularly in view of the uncontradicted testimony that both Mr. Suewer and appellee acted upon the assumption that Mr. Suewer had no authority to make such a contract for appellant.

We contend that the Trial Court's purported "Finding of Fact" is no more than a conclusion drawn from the evidentiary facts upon which this Court may substitute its judgment as freely as the Trial Court itself did when it vacated the judgment for appellant and substituted one for appellee.

3. If there was a contract of hiring at the reasonable value of appellee's services in February 1944 from that date to the end of the war (as found by the Trial Court in Finding No. 5), there is no basis for the Trial Court's finding that the compensation for such hiring was to be the reasonable value of appellee's services, not from the date of hiring, but from December 7, 1941, to the end of the war.

4. If there was a contract to pay appellee an additional sum based on the reasonable value of his services from December 7, 1941 to August 14, 1945 (as found by the Trial Court in Finding No. 5), still the Trial Court's Finding No. 7 that the reasonable value amounted to $44,250 is "clearly erroneous." That finding of a lump sum was a computation based upon an assumed rate of $1,000 per month. The finding is against the clear weight of the evidence as applied to the period prior to early 1943 when the uncontradicted testimony showed a decided lull in appellant's operations.

5. The contract found by the Trial Court was illegal and void as a violation of the Stabilization Act of 1942 (50 U.S.C., App. Sec. 961 et seq.) and the Regulations issued thereunder. The Trial Court's Finding No. 11 that there was no violation obviously is a conclusion of law and not a finding of fact.

B. Summary Statement of the Principles Applicable to Appellate Review of Findings in a Non-Jury Case.

This appeal turns on the validity of certain findings of the Trial Court. Some of those findings we believe are mislabelled —they are conclusions of law which gain no sanctity from the

erroneous label. But some of the findings challenged on this appeal are properly classified as findings of fact. We state here the general principles of law governing appellate review of such findings.

1. THE SCOPE OF APPELLATE REVIEW IS IN ACCORD WITH THE FEDERAL EQUITY PRACTICE.

Rule 52(a) *Federal Rules of Civil Procedure* governs appellate review of the trial court's findings of fact in a non-jury case. It provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

That rule was intended to and did make the then prevailing federal equity practice applicable to the review of all facts tried without a jury.[4] Such a review is of law and fact, and the finding of fact is reviewable as to the weight as well as the sufficiency of the supporting evidence. 3 *Moore's Federal Practice,* p. 3118. The appellate review is no longer limited to the question of whether there is evidence to support the finding. *Simkins' Federal Practice* (3rd ed.) p. 488.[5]

The Supreme Court stated the principle in definitive form in the recent case of *United States v. United States Gypsum Co.,* 333 U.S. 364, 92 L.ed. (Adv. Op.) 552, 68 S.Ct. 525. The court there reversed numerous findings of the trial court and

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4. The notes of the Advisory Committee expressly state the intent and it has been given effect in the cases. *United States v. United States Gypsum Co.,* 333 U.S. 364, 394-5, 92 L.ed. (Adv. Op.) 552, 68 S.Ct. 525; *Equitable Life Assurance Society v. Irelan* (9 Cir. 1941) 123 F.2d 462, 464.

5. See also *State Farm Mutual Automobile Insurance Co. v. Bonacci* (8 Cir. 1940) 111 F.2d 412, 415; *Fleming v. Palmer* (1 Cir. 1941) 123 F.2d 749, 751; *Aetna Life Insurance Co. v. Kepler* (8 Cir. 1941) 116 F.2d 1, 4-5.

after observing that Rule 52(a) made applicable the equity practice said (p. 395):

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The quoted language is in accord with the earlier authorities and has since been adopted and applied by this Court.[6]

2. WHERE THE EVIDENCE CONSISTS OF DEPOSITIONS, DOCUMENTS OR UNDISPUTED MATTERS, THE TRIAL COURT'S FINDING IS ENTITLED TO ONLY SLIGHT WEIGHT.

Not every finding of the trial court is entitled to equal weight. The reason for the rule attaching weight to the finding is the superior opportunity of the trial court to judge the credibility of the witnesses. To the extent that the finding rests upon documentary evidence, depositions or undisputed circumstances, the appellate court is in as good a position to weigh the evidence as the trial court. Accordingly, only slight weight is attached to the trial court's findings on such matters. *Equitable Life Assurance Society v. Irelan* (9 Cir. 1941) 123 F.2d 462, 464; *Himmel Bros. Co. v. Serrick Corp.* (7 Cir. 1941) 122 F.2d 740, 742; *Fleming v. Palmer* (1 Cir. 1941) 123 F.2d 749, 751; *Western Union Telegraph Co. v. Bromberg* (9 Cir. 1944) 143 F.2d 288; *State Farm Mutual Automobile Insurance Co. v. Bonacci* (8 Cir. 1940) 111 F.2d 412, 415.

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6. *Home Indemnity Co. v. Standard Accident Insurance Co.* (9 Cir. 1948) 167 F.2d 919, 923; *National Motor Bearing Co. Inc. v. Chanslor & Lyon Co.* (9 Cir. 1948) 167 F.2d 1001.

3. FINDINGS WHICH ARE CONCLUSIONS OR INFERENCES DRAWN FROM THE EVIDENTIARY FACTS ARE ENTITLED TO ONLY SLIGHT WEIGHT.

It is also true that many findings of ultimate fact consist of the inferences and conclusions drawn by the trial court from the evidentiary facts. Here again the appellate court is in as good a position to draw the inference as the trial court and accordingly such findings are entitled to only slight weight. The appellate court remains free to draw the ultimate inferences and conclusions which in its judgment the findings of evidentiary fact reasonably induce. *Kuhn v. Princess Lida of Thurn & Taxis* (3 Cir. 1941) 119 F.2d 704, 705-6; *Western Union Telegraph Co. v. Bromberg,* supra; *Home Indemnity Co. v. Standard Accident Insurance Co.* (9 Cir. 1948) 167 F.2d 919, 923; *United States v. Anderson* (7 Cir. 1939) 108 F.2d 475, 478-479; *Himmel Bros. Co. v. Serrick Corp.,* supra; *United States v. Armature Rewinding Co.* (8 Cir. 1942) 124 F.2d 589, 591; *Murray v. Noblesville Milling Co.* (7 Cir. 1942) 131 F.2d 470, 475.

II. THE CONVERSATION OF FEBRUARY 1944

Mr. Suewer's statements to appellee in February 1944 are the foundation for this action. We contend that he did no more than to inform appellee that when he could again communicate with the directors of the company he intended to recommend that some additional sum be paid to key employees as a reward for faithful service during the war. Mr. Suewer's testimony supports that contention. Appellee's testimony, at least in some respects, is in conflict. We contend that the conflict should have been resolved in favor of Mr. Suewer's version. But we also contend that even if appellee's testimony is accepted at face value, it does not support the finding that Mr. Suewer stated that his recommendation would be *based upon the reasonable value of appellee's services.*

There were no witnesses to the conversation, and neither appellee nor Mr. Suewer made any memoranda (Tr. 168, 217).

Mr. Suewer's testimony was put into evidence by deposition (Tr. 120). Appellee's deposition was taken and placed in evidence (Tr. 154). Appellee also testified at the trial but Mr. Suewer did not. As we shall show, appellee's testimony at the trial was more favorable to him than his testimony on deposition.

Mr. Suewer testified that he discussed the matter of bonuses with his assistant, Mr. Griffin, and with appellee (Tr. 184-185). Concerning the conversation with appellee, he testified that he told appellee that when the war was over and he could again communicate with Manila, he intended to ask the directors to give some of the key men, including appellee, an additional bonus beyond the usual Christmas bonus (Tr. 166).

Mr. Suewer recalled that on several occasions appellee had stated that the company's salary scale was below that prevailing in other steamship companies[7] and that some of the key men might leave (Tr. 182). Mr. Suewer was explicit in his testimony that his statements about a bonus were not made in the course of any such discussion (Tr. 182), but rather that they were made voluntarily (Tr. 167). He was emphatic in his testimony that appellee had never threatened to resign unless a pay increase was given and that he had never interpreted appellee's remarks about "key men" leaving as a veiled threat that appellee himself would resign (Tr. 182). Mr. Suewer also testified that the identity of the key men for whom he would recommend a bonus was not discussed beyond the specific inclusion of appellee (Tr. 183); that there was no discussion of the amount or basis upon which the recommendation would be made (Tr. 196-197); that he himself had never contemplated that the recommendation would be based on salaries paid by other companies (Tr. 196-

7. In this connection, it should be noted that appellee himself recognized that appellant, being a smaller company, could not meet the salaries being paid by larger steamship companies. See appellee's letter to the Treasury Department dated August 10, 1943, wherein appellee sought approval of the 1943 pay increase (Tr. 117).

197). He also testified that he had informed appellee that he had no authority to take such action without the approval of the Board of Directors, but that he believed that the Board would follow his recommendation (Tr. 183).

With respect to appellee's version of the conversation, we turn first to the allegations in his verified complaint. He alleged that in February 1944 Mr. Suewer, in response to appellee's complaints about an inadequate salary and threat to resign, had replied that if appellee would remain appellant would, within a reasonable time after termination of actual warfare, pay appellee an additional sum *equal to the difference between what appellee was paid from December 7, 1941 to the termination of actual warfare and what other persons holding comparable positions in similar steamship companies were paid* (Tr. 3-4).

In his deposition, appellee's version of the conversation differed from Mr. Suewer's principally in that appellee placed Mr. Suewer's statements about a bonus in the context of a discussion of salaries in general and particularly of the higher salaries being paid by other steamship companies (Tr. 209). Appellee testified that Mr. Suewer had agreed that the company's salaries were below other steamship companies and that something should be done about it when they could again communicate with Manila. He also testified that in that discussion he told Mr. Suewer that some of the higher ups, including himself, would leave unless something was done about higher salaries (Tr. 217) and that Mr. Suewer had said that he did not have authority to grant any bonus but that it would be taken up with the home office when communications were restored (Tr. 209-210).

It will be observed that appellee's testimony on deposition about the amount of the bonus and what Mr. Suewer had said is substantially the same as Mr. Suewer's testimony, the only appreciable difference lying in the context in which the statements were made. Appellee stated that the conversation ended

with the understanding that Mr. Suewer would take the matter up with the home office when communications were restored. With respect to the amount of the bonus, appellee testified in his deposition:

> "Q. What discussion was had at that time as to the amount of the bonus?
>
> A. There was no actual amount mentioned on it other than what would be considered a fair bonus for the top men that had carried on through the war period at a low salary. There was no actual amount stipulated to.
>
> Q. So he therefore agreed at that time to take the matter up with the people in Manila after Manila was liberated?
>
> A. That's right. Well, he felt or he asserted that he knew that if he recommended certain increases or bonuses for the boys at work during the war period, he felt positive they would be granted.
>
> Q. But there was no fixing of any amount?
>
> A. No stipulation as to the amount at all and we trusted the boy." (Tr. 210)

At the trial, appellee's recollection was more detailed and, on the whole, more favorable to himself. Again he recalled that on several occasions he had pointed out to Mr. Suewer that the company's salary scale was below that of other steamship companies and that the key men would resign unless something was done about it. At least one of these conversations appears to have been in connection with the 1943 pay increases (Tr. 66-67). As to whether appellee himself had threatened to resign, appellee again reaffirmed that he had, but again it is not clear whether the threat was explicit or whether it was implied in appellee's understanding that he was one of the "key men" to whom he referred (Tr. 67). He testified that Mr. Suewer's remarks about a bonus were made in response to such assertions (Tr. 67). And this time, it may be noted, appellee testified that he himself did not consider that it would really

be a bonus. "It was more on the basis of working out something to make up the difference of a comparable salary paid by other corporations at the time during the war * * *" (Tr. 68).

With respect to just what Mr. Suewer had said he would recommend to the directors, appellee testified on direct examination:

> "Q. No, you said he was going to recommend. Will you tell the court the substance of what Mr. Suewer told you?
>
> A. He told me that he thought a comparable salary—I mean a bonus worked out on a basis of a comparable salary—in other words, if somebody was getting $1000 a month and I was getting $600 a month, he figured we should get $400 a month during the war period to make up the difference.
>
> Q. You mean an employee or someone outside of your company?
>
> A. That is right.
>
> Q. What did he say he would do with respect to having such an additional compensation paid you? What did he say he would do about it?
>
> A. He said he would make the representation and felt sure his recommendation would go—in fact, he expressed himself that he would insist upon them paying it." (Tr. 68-69)

On cross-examination, with the aid of some questions by the court, appellee definitely linked the amount of the promised recommendation to the basis of comparable salaries being paid by other steamship companies:

> "Q. In your discussion with Mr. Suewer you did not get down at any time to a discussion of amount, did you?
>
> A. Any actual amount?
>
> Q. Yes.
>
> A. No.
>
> Q. There was never any mention of it, was there?
>
> A. Not as to whether it would be $5,000, $2,000, no.

It was always based upon what would be fair compensation for the work we were doing under the circumstances we were working.

Q. That last statement that you just made was not a part of any discussion you had with Mr. Suewer; that was just your own impression, isn't it?

A. No, no. The thing was discussed with him on the basis of what we would shoot at. No actual amount was stipulated.

The Court: Q. What did he say that he would do?

A. He said he would recommend to the board of directors, and felt positive they would follow his recommendations.

Mr. Aldwell: Q. Recommend what, Mr. Pierson?

The Court: That is what I am trying to get at.

A. The amount of money that would be paid. It would be on the basis of the salary we should have received, in comparison with what other steamship lines were paying.

The Court: Q. Is that what he said?

A. Make up the difference, correct.

Mr. Aldwell: Q. Did he say he would recommend it on that basis?

A. Yes, sir." (Tr. 84-85)

Appellee also testified that there was no discussion about what persons would receive the bonus other than the reference to "key men" (Tr. 86-87). On cross-examination, appellee admitted that Mr. Suewer had informed him that he had no authority to grant such a bonus but that he (Mr. Suewer) was confident that the directors would accept his recommendation. Appellee said that he was confident, too (Tr. 83-84).

We contend that such testimony does not warrant the finding that Mr. Suewer said that his recommendation would be based upon the reasonable value of appellee's services during the period of warfare and that finding No. 4 is to that extent "clearly erroneous."

In examining the evidence, we point out that Mr. Suewer's testimony is in the record by deposition. This court is in as good a position as the trial court to judge the credibility of his testimony. The same is true of part of appellee's testimony.

Mr. Suewer's testimony is straightforward and convincing and is corroborated by the circumstances. We refer particularly to the discussion of Mr. Suewer's authority. It is not disputed that he informed appellee that he did not have the authority to authorize the additional sum contemplated and could only make a recommendation to the directors. If all that was contemplated was to pay appellee the reasonable value of his services it is quite evident that no such denial of authority would have been made or believed. Mr. Suewer did have authority to grant pay increases. He had done so in the preceding year when he increased appellee's salary from $600 to $708.33 a month. He did so again in 1945 when he increased appellee's salary from $708.33 to $750 per month. But on the other hand, if the bonus discussed was of the nature testified to by Mr. Suewer, namely, the recommendation of some additional sum as a reward to faithful employees, the denial of authority to act is understandable. Such a payment would be over and above normal compensation for service. We respectfully suggest that both parties to the conversation understood at the time that the bonus under discussion was of this nature.

But even if appellee's version of the conversation were to be accepted, it would not support the finding.

Appellee first testified that there was no discussion of the amount to be recommended other than

> "what would be considered a fair bonus for the top men that had carried on through the war period at a low salary" (Tr. 210).

That account is substantially in accord with Mr. Suewer's testimony. At the trial, appellee revised his testimony as to what

Mr. Suewer had said and testified that Mr. Suewer had told him that the recommendation would be based upon salaries being paid for comparable positions in similar steamship companies (Tr. 85). But neither of appellee's versions supports the finding. A recommendation based upon salaries paid by other steamship companies is not equivalent to a recommendation based upon the reasonable value of the individual's services. We think it evident that the reasonable value of appellee's services may have been much more or much less than the salary prevailing in other steamship companies for comparable positions. Accordingly, we respectfully submit that the trial court's finding that Mr. Suewer stated to appellee that the basis upon which he would recommend the bonus would be the reasonable value of appellee's services finds no support in the evidence. The choice permitted by the testimony is between a finding that Mr. Suewer stated no basis for the bonus (as testified by Mr. Suewer and, we think, corroborated by appellee on deposition) or that he stated that the recommendation of a bonus would be based upon salaries prevailing in other steamship companies for comparable services (as testified by appellee at the trial).

III. THE CONVERSATION OF FEBRUARY 1944 DID NOT CREATE A CONTRACT OF EMPLOYMENT

If the trial court's finding of the evidentiary facts is accepted, still we contend that those facts did not give rise to a contract.

The trial court purported to find as a "fact" (Finding No. 5; Tr. 29) that the conversation of February 1944 constituted a contract of hiring from that date to the termination of the war. We respectfully submit that this deduction by the trial court is a conclusion of law drawn from the evidentiary facts and that the trial court's own action demonstrates that this is so.

It will be recalled that the trial court originally ordered judgment for appellant, saying that there was no evidence of contractual liability (Tr. 16). Findings of fact and conclusions of

law were adopted pursuant to that order and judgment was entered for appellant. The evidentiary facts originally found (what was said in the conversation of February 1944) were substantially identical with those subsequently adopted (Tr. 18). The trial judge simply changed his mind about the legal consequences of those facts. This is made clear in the order vacating the original judgment (Tr. 25):

> "The legal effect of the understanding between plaintiff and defendant's United States Manager was that plaintiff would continue in defendant's employ at a salary or compensation to be later fixed. This was tantamount to a hiring at an undertermined salary equivalent at least to the reasonable value of plaintiff's services. § 1611 California Civil Code."

We think that the correct rule is that in determining the existence of a contract the question of what was said and done is a question of fact. But whether those facts constitute a contract or not is a question of law (100 A.L.R. 969). But it is unnecessary to argue the question. If the existence of a contract under the present circumstances is not purely a question of law, at least it is one of those questions of mixed law and fact in which the answer is found by inferences and conclusions drawn from the evidentiary facts. The findings on such matters are not entitled to the weight generally given to a finding of fact for the appellate court is in as good a position to draw the inference as the trial court and is free to substitute its judgment.[8]

We invite this Court to review the evidence and, accepting the trial court's finding of the evidentiary facts, to exercise the same freedom about drawing the inference of contract or no-contract as the trial court itself did when it vacated the judgment for appellant and entered one for appellee.

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8. See cases cited supra at p. 16.

A. The Contract Found by the Trial Court Is Inconsistent With the Finding of Evidentiary Facts.

The trial court's Finding No. 5 that the conversation of February 1944 created a contract of employment from that date to the end of the war is inconsistent with the finding of what was actually said in that conversation. In Finding No. 4 the trial court found that Mr. Suewer had stated that he

> "would recommend to the Board of Directors that such additional sum of money or bonus be paid * * *."

But to say, as the trial court did, that the conversation *itself* constituted a contract of hiring at the reasonable value of appellee's services is to make a nullity out of the express promise to "recommend." There would be no need to recommend anything, the duty to pay would have arisen already.

Such a construction is equivalent to finding that the promise was "to pay" rather than "to recommend." It is plain that the testimony will not bear such an interpretation as to what was said, and the trial court did not even suggest in its findings that there was a promise *to pay* as distinguished from a promise *to recommend.* The finding of a contract necessarily assumes that a promise to *recommend payment* of the reasonable value of the services is, in legal effect, a promise that the amount will be paid. The conclusion does violence to the ordinary meaning of words.

B. There Was No Intent to Contract.

Both parties to the conversation testified that Mr. Suewer had informed appellee that he had no authority to grant the additional sum which was being discussed. Whether Mr. Suewer was correct in his conclusion about his authority is entirely immaterial. When a man states that he does not have authority to enter into a contract, we do not understand how an intent to contract can be imputed to him. Neither do we understand

how the other party, having been advised of the lack of authority, could possibly consider that he was entering into a contract. To find, as the trial court did, that a contract was entered into in the course of a conversation in which both parties assumed that there was no authority to make the contract, disregards the fundamental basis of contract law—that a contract is a matter of mutual intent.

IV. THERE IS NO BASIS IN THE EVIDENCE FOR THE FINDING THAT THE CONTRACT OF EMPLOYMENT INVOLVED A RETROACTIVE ADJUSTMENT IN PAY.

If the conversation of February 1944 constituted a contract of employment from that date to the end of the war (as the trial court found in Finding No. 5), there is no basis for the further finding that the compensation agreed upon was to be the reasonable value of appellee's services, *not during the term of the contract, but from December 7, 1941 to the termination of the war.*

On its face that would be an extraordinary agreement. Appellee's theory about what happened in the February 1944 conversation does not support the inference that the parties agreed upon any such consideration. The transaction which appellee sought to persuade the Court to believe had occurred was that appellee, being underpaid, had threatened to resign and that Mr. Suewer, in order to retain his services, had entered into a contract with him to pay additional money. If the court accepts that version of the facts, it might be reasonable to assume that Mr. Suewer would have agreed to pay appellee enough to retain his services, but that would have been done by an agreement to pay the reasonable value of his services from that date forward. It seems to us most unlikely that an employer, faced with an employee who demanded a salary equal to what competitors were offering, would not only agree to meet such competitive

salaries but also would agree to reopen the question of salary for more than two years past and pay an additional sum for that period too.

We think that such an agreement is so improbable that it cannot be sustained without definite testimony to support it. Yet the evidence which we have been able to discover in the Record with respect to this matter consists of nothing more than a few vague remarks about compensation for the "war period" (Tr. 68, 84-85, 210). We do not believe that these general remarks are any basis for finding that an agreement for future hiring involved a promise to pay the reasonable value of appellee's services for more than two years past.

The finding of a retroactive adjustment also is inconsistent with the reasoning upon which the trial court deduced the existence of a contract.

In the order vacating the judgment for appellant, the trial court explained the action taken by stating that:

> "The legal effect of the understanding between plaintiff and defendant's United States Manager was that plaintiff would continue in defendant's employ at a salary or compensation to be later fixed. *This was tantamount to a hiring at an undertermined salary equivalent at least to the reasonable value of plaintiff's services.* § 1611 California Civil Code." (Tr. 25).

The statute cited by the trial court provides:

> "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, *the consideration must be so much money as the object of the contract is reasonably worth.*"

That reasoning would support a conclusion or inference that the compensation *during the term of the contract* was to be the

reasonable value of the services performed. But the contract found by the trial court was one in which the consideration for the services to be performed during the term of the contract was *more than the reasonable value of those services.* It was the reasonable value of the services to be performed *plus* an adjustment of past services. Plainly, such an agreement cannot be inferred from the premise that a hiring at an undetermined amount is equivalent to a hiring for the reasonable value of the services to be performed.

For these reasons, we respectfully submit that even if the trial court's finding of a contract of employment is upheld and even if the Court agrees that it was an implied or express term of such contract that the compensation should be the reasonable value of the services, the only possible interpretation is that the agreement was for the reasonable value of services to be performed *during the term of the contract,* namely, from February 1944 to August 14, 1945.

V. THE TRIAL COURT ERRED IN FINDING THE REASONABLE VALUE OF APPELLEE'S SERVICES

The trial court found that the reasonable value of appellee's services for the period December 7, 1941 to August 14, 1945 amounted to $44,250 (Finding No. 7; Tr. 29-30). That sum is a computation, arrived at pursuant to stipulation of counsel, of what the total would be if the reasonable value was $1,000 per month throughout the entire period (Tr. 140).[9] We contend that this finding is "clearly erroneous."

Preliminary to a review of the evidence, we point out that the question of what constitutes "reasonable compensation" is one of those questions of ultimate fact which involves in a large measure the conclusions and inferences of the trial court drawn

9. The discrepancy between the amount stipulated to (Tr. 140) and the amount appearing in the findings is accounted for by correction of an error in computing the amount which was corrected after the trial.

from evidentiary facts. Accordingly, the appellate court remains free to draw its own conclusion about the reasonable value of services. *Kuhn v. Princess Lida of Thurn & Taxis* (3 Cir. 1941) 119 F.2d 704, 705-706.[10]

The undisputed evidence shows that in 1942 there was a substantial lull in appellant's business activity during that interval between disruption of appellant's normal operations by the outbreak of war and commencement of operations for the War Shipping Administration (Tr. 41, 164-165). The testimony about the increased duties and responsibilities of appellee related solely to the period of operations for War Shipping Administration, and these did not commence until early 1943.

The testimony about the reasonable value of appellee's services was given by a Mr. Parkinson and by appellee himself.

Mr. Parkinson, *after restating appellee's duties and responsibilities during the peak of war shipping business,* testified that the minimum salary for *such duties and responsibilities* should be $12,000 a year (Tr. 95). That testimony certainly does not support a finding of $1,000 a month during the entire period. At least, by inference, it indicates a substantially lower figure for a period such as the year 1942.

Appellee himself testified flatly that in his opinion the reasonable value of his services amounted to a minimum of $1,000 per month for each and every month of the war period (Tr. 140). It is evident that the Trial Court accepted appellee's testimony in toto. We respectfully submit that that finding is clearly erroneous. As applied to the earlier portion of the period involved, it is in conflict with necessary inferences from Mr. Parkinson's testimony. It also is contradicted by the undisputed physical facts of a substantial lull in activity during that period.

We think, too, that it is contradicted by the inferences which must be drawn from the undisputed evidence with respect to

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10. See discussion and cases at page 16, supra.

prior dealings between the parties regarding wages. It will be recalled that appellee was employed on July 1, 1940 at $600 per month. He admitted that that was more money than he had been receiving before (Tr. 205). From July 1, 1940 until 1943, appellee remained at the same salary. Indeed, it was not until 1943 that he even brought up the subject of an increase (Tr. 179).

Certainly, there was nothing to have hindered appellee from going elsewhere, if he was being underpaid. That he did not do so seems to us to be the strongest sort of evidence that the worth of his services in that period did not materially exceed the $600 per month which he was being paid. Is it conceivable that on December 7, 1941 the reasonable value of his services jumped from $600 to $1,000 per month? We think not, and particularly in view of the undisputed fact that the outbreak of the war brought with it a substantial lull in appellant's business activity, which could only lessen the value of appellee's services in this period.

In the face of all these circumstances, we respectfully submit that the trial court's finding, which is supported only by the spoken words of appellee himself, must be rejected as clearly erroneous.

VI. THE DEFENSE OF ILLEGALITY

The trial court found (Finding No. 5; Tr. 29) that under the terms of the contract of employment the additional amount was payable *within a reasonable time after termination of actual combat warfare* and that such actual combat warfare terminated August 14, 1945. At the same time the trial court found that the agreement was that the additional compensation was payable only *after the termination of wage and salary controls* (Finding No. 11; Tr. 31).

The two findings are inconsistent, and we submit that Finding No. 5 is the only one permissible under the evidence and that Finding No. 11 is "clearly erroneous."

The trial court also purported to find as a "fact" that such payment was not prohibited by the Stabilization Act of 1942 and the regulations issued thereunder.

That is quite plainly a question of statutory interpretation and so is a matter of law rather than of fact. We challenge the interpretation of the statute.

A. The Contract, if One Was Made, Was for Payment at an Ascertainable Future Date Irrespective of the Termination of Wage Controls.

We find not the slightest indication in the Record that the time for payment of any amount which might be due under the contract found by the trial court was set with reference to the termination of wage and salary controls. If there was a contract it was a contract to pay additional compensation for the period of hiring which terminated with the end of actual combat warfare on August 14, 1945. The time for payment which must be inferred from such a contract would be a date within a reasonable time after performance. Accordingly, the trial court's Finding No. 5 that the time agreed for payment was to be a reasonable time after termination of actual combat warfare finds support in the inferences to be drawn from a contract in such form. We find nothing in the evidence to indicate that the parties had any contrary intent. It seems evident that payment was to be delayed only because of the necessity of first communicating with the home office in Manila (Tr. 166).

In this connection we turn to the allegations of appellee's verified complaint. He there alleged that Mr. Suewer had promised to pay the bonus "within a reasonable time of the termination of such actual warfare" (Tr. 3-4) and alleged else-

where that the actual warfare referred to terminated August 14, 1945 (Tr. 3, 4-5). Nothing in that allegation suggests that the time for payment was arrived at with reference to the termination of wage controls.

Neither do we find anything in appellee's testimony to suggest that the date for payment was agreed upon with reference to termination of wage controls.

Accordingly, we think that Finding No. 5 in which the trial court found, in accordance with the allegations of the complaint, that the additional compensation was payable "within a reasonable time after the termination of the war" (Tr. 29) is the only finding which could be sustained by the evidence.

Termination of the war plainly is not equivalent to the termination of wage controls. It is a matter of common knowledge that a large number of the wartime economic controls continued for a substantial period beyond the war and in fact still continue. The coincidence that in this case actual combat terminated on August 14, 1945 and that wage controls were partially lifted on August 18, 1945 does not alter the fact that the time for payment was set in complete disregard of the existence or non-existence of wage controls.

B. A Contract to Pay an Additional Sum at the Termination of Actual Combat Warfare Is Illegal and Void.

We discuss in this section the legal status of a contract to pay an additional sum at the end of actual warfare, irrespective of the existence or non-existence of wage and salary controls. This was the contract found in Finding No. 5, and as we have shown in the preceding section, it is the only permissible interpretation of the evidence.

It is not disputed that this agreement to pay additional compensation fell within the application of the Stabilization Act of 1942 (Act of October 2, 1942, Chapter 578, 56 Stat. 765; 50

U.S.C. App. Sections 961 et seq.) and the regulations issued thereunder. Relevant portions of that statute provide:

> "Section 965. (a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act."
>
> "Section 970. When used in this Act the terms 'wages' and 'salaries' shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services * * *."

Pursuant to that Act and to Executive Order 9250, the regulations were issued requiring approval by the Secretary of the Treasury for any increase in the salary paid to an individual earning more than $5,000 a year (29 C.F.R., Part 1002.10). No such approval was sought or obtained for the increase involved in this case.

Actual combat warfare ended August 14, 1945. The additional sum was therefore due within a reasonable time from that date. By Executive Order No. 9599, wage and salary controls, effective August 18, 1945, were released to an extent which would have permitted payment.

Had the payment been due *on* August 14, while wage controls were still in force, we think there could be no question that the contract would be illegal and unenforceable. It has been so held in numerous cases[11] and we do not understand appellee to contend otherwise.

But if the finding that payment was due within a reasonable time after August 14, 1945 means a date subsequent to August 18, 1945, the situation is one where, due to a modification of the regulations, the payment would be lawful at the time for performance. We submit that such a contract is equally void.

The great weight of authority holds that a bargain for an

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11. See *Wernhardt v. Koenig* (E.D. Pa. 1945) 60 F.Supp. 709; *Del Re v. Frumkes* (Supreme Court, 1948) 81 N.Y.S.2d 97.

illegal act is itself illegal and that a subsequent change in the law permitting such an act does not breathe life into a void contract. 6 *Williston on Contracts* (Rev. ed.) Sec. 1758; *Rest. of Contracts,* Sec. 609; *Fitzsimons v. Eagle Brewing Co.* (3 Cir. 1939) 107 F.2d 712, 126 A.L.R. 681; Note 126 A.L.R. 685; *Palmisano v. United States Brewing Co.* (10 Cir. 1942) 131 F.2d 272.

The contract in question, if it was made at all, was one made and to be performed in California. The California statutes and cases require adherence to this principle.

California Civil Code, Sec. 1667, declares:

> "That is not lawful which is:
>
> 1. Contrary to an express provision of law;
> 2. Contrary to the policy of express law, though not expressly prohibited * * *."

California Civil Code, Sec. 1550, declares:

> "It is essential to the *existence* of a contract that there should be:
>
> * * * * * * *
>
> 3. A lawful object."

A contract to pay an additional sum at an ascertainable future date, made at a time while salary controls are in effect, is one having an unlawful object and is void from its inception.

The California cases have uniformly held that a contract to do an act prohibited by statute, whether *malum in se* or *malum prohibitum,* is illegal and void. *Smith v. Bach,* 183 Cal. 259, 191 Pac. 14. Such a bargain being void from its inception, cannot draw life from the subsequent repeal of the prohibitory law. *Willcox v. Edwards,* 162 Cal. 455, 461, 123 Pac. 276.

With respect to the statute and contract involved in this case, we submit that *In re Pringle Engineering & Mfg. Co.* (7 Cir. 1947) 164 F.2d 299, is controlling. There a contract was made to pay a salary and a bonus consisting of a percentage of sales.

Approval was sought from the Salary Stabilization Unit and was granted with respect to the salary but deferred with respect to the bonus with instructions to renew the application when the time for payment arrived. Prior to the time for payment of the bonus, controls were lifted. The Court denied the claim for a bonus, saying at p. 301:

> "the bonus plan not being in effect while the Stabilization Act controlled salaries, it could not rise phoenix-like out of the ashes of the revocation of the salary clause, because it is a general rule that the terms of a contract must be determined by the law in effect when the contract is made. Hannay v. Eve, 3 Cranch 242, 2 L.Ed. 427; Steffey, Inc. v. Bridges, 140 Md. 429, 117 A. 887. The proposed bonus, moreover, was in derogation of the spirit as well as the purpose of the Act, namely, 'In order to aid in the effective prosecution of the war, the President is authorized * * * to issue a general order stabilizing prices, wages, and salaries * * *.' 50 U.S.C.A. Appendix, § 961. Any bonus agreement between the parties then was illegal, and the referee properly held the agreement not binding on the bankrupt."

We also point out that the rationale of the decision, if not the precise holding, in *Kells v. Boutross* (Supreme Court, 1945) 53 N.Y.S.2d 734, is in accord with this rule.

These cases, we think, establish that the only contract which can be inferred from the evidence is illegal and void.

C. An Agreement to Pay an Additional Sum After Termination of Salary Controls Is Unenforceable.

If this Court were to accept the inconsistent and unsupported finding that the agreement was to pay the additional sum *after termination of salary controls,* a novel and important problem in the law of illegality would be presented.

The question is whether parties can lawfully contract that after termination of salary controls an additional sum shall be

paid *for services rendered during the period of salary controls.*

We have found no cases in point and can only argue the matter on principle. The absence of authority is a strong indication that such bargains were not thought lawful, for it takes little imagination to foresee widespread use of such a device to evade the salary stabilization laws, if such contracts were thought valid.

The answer depends upon whether such a contract violates the purposes and policies of Congress expressed in the Stabilization Act of 1942. We think that it does.

The policy and purposes of the law are pretty much a matter of judicial knowledge and they are summarized in the President's Message to Congress on Inflation, September 7, 1942 (H. Doc. 834; 88 Cong. Rec. 7283).

The control of wages was important largely to make possible control of the price of goods. But if such contracts were valid, the real cost of production would increase just as much as though the higher wages were paid in cash concurrently with the services. The inflationary pressure would continue for an employer would have to set aside a reserve out of current income to meet the accumulation of additional pay to become due in the future.

It was a part of the scheme of wage and salary controls to prevent competition for labor and services from disrupting the normal economic life of the country. It was important that employers in non-essential industries not be allowed to hire employees away from essential industries by offering higher wages. But such a scheme as this would simply have shifted the zone of competition to promises of bonuses after termination of controls and so would have frustrated the purpose.

It was part of the Congressional purpose to prevent accumulation of large excess purchasing power in a period of restricted supply of goods. But if this contract is valid, then so would be

a contract by which the additional sum was represented by a promissory note payable after termination of wage controls. Such a note would be available as security or could be sold and result in the very evil against which the law was directed. Even without issuing a note, the contract to pay would be available as security for loans. And even without utilizing the contract to raise cash, it would have somewhat the same effect in that the employee could freely spend the full amount of his current cash receipts, secure in the knowledge that he would collect a substantial sum after the war.

Congress was not solely concerned with inflation during the war. The problems of post-war readjustment were a matter of Congressional concern throughout the war. The disastrous effects of releasing a pent-up flood of back pay are readily imaginable. As a practical matter it would simply have made impossible the removal of wage controls for many years after the war and thus have forced continuation of the thoroughly disliked economic controls long beyond Congressional intent.

We think, then, that such a device to evade the law plainly is contrary to the intent and purposes of Congress.

But, we may assume that appellee will contend that the letter of the statute does not condemn such a bargain. We submit that that is not enough to save it.

The fact is that the statute, itself, does not condemn any kind of contract. It simply forbids an act. The contract is illegal and void, not because it is so declared in the statute, but because a bargain to do such an act is one having an unlawful object and therefore lacks an essential element of a contract. Cal. Civil Code Sec. 1550(3).

The statute establishes a policy and the Court refuses to enforce a bargain repugnant to the policy. But the public policy established by the statute may be broader than the express language of the statute. Thus it is provided in Cal. Civil Code Sec. 1667:

"That is not lawful which is:

1. Contrary to an express provision of law;
2. Contrary to the *policy* of express law, *though not expressly prohibited;*"

The California courts construing this section have declared that in determining the validity of a bargain, the policy and purposes of the law must be looked to and that a bargain designed to evade the policy of the law will not be enforced. 6 Cal. Jur. p. 104, and cases cited.

We urge that the Court, if it accepts this interpretation of the bargain, declare such an attempted evasion of the law to be contrary to the policy of the statute and unenforceable.

CONCLUSION

We have argued a number of independent reasons and grounds for reversal of the judgment. It is pointless to extend this brief by summarizing them here. If this Court accepts any one of the several points made, the judgment must be reversed.

December 2, 1948.

Respectfully submitted,

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No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),
Appellant,

vs.

H. H. PIERSON,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Introductory statement	1
I. The findings of the trial court will be accepted on appeal where there is substantial testimony supporting them and they are based upon conflicting testimony involving the credibility of witnesses appearing before the trial court	2
II. Every essential element of the court's findings relative to the nature and effect of the conversation of February, 1944, is supported by substantial evidence	6
A. A contractual obligation was created	8
B. Whether there was an intention to contract was a question for the trial court	9
C. Suewer's promise to recommend and insist on the payment of the bonus obligated the appellant	11
D. Regarding the "retroactive" adjustment of pay	12
E. The valuation placed upon plaintiff's services by the trial court finds ample support in the evidence	15
III. As a matter of law, the conversation of February, 1944, created a binding obligation	19
IV. The contract was not illegal	22
A. The logical inferences from the facts support the trial court's finding that payment would not be made until after the termination of controls	23
B. Substantive law required the trial court to interpret the contract only as requiring payment when lawful	27
C. The salary stabilization laws did not forbid this contract expressly or by implication	28
1. The cases cited by appellant are inapplicable	28
2. The contract made by the parties is in violation of neither the letter nor the spirit of the Stabilization Act of 1942	31
Conclusion	41

Table of Authorities Cited

Cases	Pages
Adamson v. Gilliand, 242 U. S. 350, 37 Sup. Ct. 169, 61 L. Ed. 356	3
Anglo Calif. Nat. Bank v. Lazard (9 Cir. 1939), 106 Fed. (2d) 693 (cert. den.)	4, 7
Biggs v. Mays (8 Cir. 1942), 125 Fed. (2d) 693	10
Crane v. Derrick, 157 Cal. 667, 109 Pac. 31	22
Davis v. Johnston (9 Cir. 1946), 157 Fed. (2d) 64	6
Diamond Laundry Corp. v. Calif. Emp. Stab. Comm. (9 Cir. 1947), 162 Fed. (2d) 398	6
Dumas v. King (8 Cir. 1946), 157 Fed. (2d) 463	7
Gelb v. Benjamin, 78 Cal. App. (2d) 881, 178 Pac. (2d) 476	39
Hartford Acc. & Indem. v. Jasper (9 Cir. 1944), 144 Fed. (2d) 266	5, 8
Home Indem. v. Standard Accident Ins. Co. (9 Cir. 1948), 167 Fed. (2d) 919	2
In re Pringle Engineering and Manufacturing Co. (7 Cir. 1947), 164 Fed. (2d) 299	30
Kersch v. Taber, 67 Cal. App. (2d) 499, 154 Pac. (2d) 934	26
Kuhn v. Princess Lida (3 Cir. 1941), 119 Fed. (2d) 704	5, 19
Leick v. Missouri Plating Co., ... Mo. ....., 211 S. W. (2d) 77	39
Leoni v. Delaney, 83 Cal. App. (2d) 303, 188 Pac. (2d) 765	21
Mayborne v. Citizens Bank, 46 Cal. App. 178, 188 Pac. 1034	21
Medina v. Van Camp Sea Food Co., 75 Cal. App. (2d) 551, 171 Pac. (2d) 445	22
Moody v. Boas Finance Corp., 93 Cal. App. 21, 268 Pac. 974	21
Nussenbaum v. Chambers & Chambers, Inc., ... Mass. ....., 77 N. E. (2d) 780	34, 39

Pages

Occidental Life Ins. Co. v. Thomas (9 Cir. 1939), 107 Fed. (2d) 876 ..... 5, 27
O'Keith v. Johnston (9 Cir. 1942), 129 Fed. (2d) 889..... 4

Pappas v. Delis, 79 Cal. App. (2d) 392, 181 Pac. (2d) 61 (hearing denied California Supreme Court, cer. den. U.S. Supreme Court 332 U.S. 808, 68 S.C. 107)..... 38
Plack v. Baumer (3 Cir. 1941), 121 Fed. (2d) 676..... 18

Ray v. Amer. Photo Player Co., 46 Cal. App. 311, 189 Pac. 130 21
Robbins v. Pac. Eastern Corp., 8 Cal. (2d) 241, 65 Pac. (2d) 42 27

Smith v. Bach, 183 Cal. 259, 191 Pac. 14..... 29
Smith v. Porter (8 Cir. 1944), 143 Fed. (2d) 292..... 4

Thacker v. American Foundry, 78 Cal. App. (2d) 76, 177 Pac. (2d) 322 40

United States v. State Street Trust Co. (1 Cir. 1942), 124 Fed. (2d) 948 19
U. S. v. U. S. Gypsum Co., 333 U. S. 364, 92 L. Ed. (Adv. Op.) 552, 68 Sup. Ct. 525 2

Weber v. Alabama-California Gold Mines Co. (9 Cir. 1941), 121 Fed. (2d) 663 ..... 7, 18
Willcox v. Edwards, 162 Cal. 455, 123 Pac. 276..... 30
Wittmayer v. U. S. (9 Cir. 1941), 118 Fed. (2d) 808..... 3, 4

Statutes

Civil Code:
Section 1589 21
Section 1611 14
Section 1643 28
Section 3541 28
Code of Civil Procedure:
Section 1963 (33) 38

Pages

56 Stat. 765, Section 1 32
56 Stat. 767, Section 5 ..... 25, 32

50 U.S.C. App. Section 966 25
50 U.S.C.A. App., Section 901 Note 35
50 U.S.C.A. App., Section 961 32
50 U.S.C.A. App., Section 965 32

Miscellaneous

126 A.L.R. 701 29
12 Am. Jur. 647 27

6 Cal. Jur. 487 39

Executive Order No. 9250, October 3, 1942, Title II(1) 35

7 Fed. Reg. 7873 35
10 Fed. Reg. 11962 33
Federal Rules of Civil Procedure, Rule 52(a) 4, 5, 6, 18

O'Brien, 1937 Cum. Supp. to Manual of Federal Appellate Procedure, 2d Ed., p. 62 4

Restatement of the Law of Agency, Section 457 21
Restatement of the Law of Restitution, Section 1 21

T. D. 5295, sub-part G; 8 Fed. Reg. 12428; C.F.R. Supp. 1943, Book 1, Section 1002.28 33
T. D. 5295, sub-part G; 8 Fed. Reg. 12428; C.F.R. 1943 Supp., Title 32, p. 1238 ..... 32, 33

Williston on Contracts, Revised Edition, Volume 6, Section 1758 29

No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),
Appellant,

vs.

H. H. PIERSON,
Appellee.

BRIEF FOR APPELLEE.

INTRODUCTORY STATEMENT.

Appellant's "statement of the case" in its opening brief (pp. 3-10) undertakes to summarize the evidence in this appeal. To the extent that appellee disagrees with appellant's analysis of the facts, comment will be made thereon in connection with the discussions of the points raised in the body of appellant's argument. Appellee will endeavor to answer the points raised in the order in which the same appear in the appellant's brief, commencing with the statement under the topic heading "Preliminary Analysis" of appellant's position relative to appellate review of findings in a non-jury case.

I. THE FINDINGS OF THE TRIAL COURT WILL BE ACCEPTED ON APPEAL WHERE THERE IS SUBSTANTIAL TESTIMONY SUPPORTING THEM AND THEY ARE BASED UPON CONFLICTING TESTIMONY INVOLVING THE CREDIBILITY OF WITNESSES APPEARING BEFORE THE TRIAL COURT.

The statements concerning the scope of judicial review appearing at pages 14 and 15 of Appellant's Brief are accurate enough, but they have no proper bearing upon this appeal. For example, in *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364; 92 L. Ed. (Adv. Op.) 552; 68 Sup. Ct. 525, cited by the appellant, the issue was whether the defendants had conspired to evade the Sherman Act. Despite the evidence contained in contemporaneous documents, the authors thereof testified they had no intention to engage in concert. The Supreme Court held in effect that the documentary evidence so clearly outweighed the pious denials of intent that the Court's action in accepting the testimony was clearly error. In short, the essential ruling was that as a matter of law the offense was proved without regard to the apparent conflict created by the testimony.

Similarly, in *Home Indem. v. Standard Accident Ins. Co.* (9 Cir. 1948); 167 Fed. (2d) 919, which is relied on by the appellants, this Court pointed out that there was no dispute that the insured had on five separate occasions delivered five separate and completely divergent versions of an accident. The trial Court's finding that this did not constitute prejudice to the insurer's defense of litigation arising from the accident was a conclusion of law, or an inference involving

a matter of law from undisputed facts. Under such circumstances it was the power and duty of this Court to resolve the question whether such conduct constituted prejudice independently of the trial Court's conclusion.

These last mentioned cases merely exemplify a simple rule—the pertinency of undisputed facts may be a matter of law. If so, to ignore such pertinent facts is an error of law.

Appellee's position is that this is not a case where the trial Court's determination disregarded any facts conclusive upon the issues as a matter of law, but that the findings relative to the character of the agreement between appellant and appellee are findings of fact based upon conflicting testimony, and that each essential fact is supported by substantial evidence.

This Court has repeatedly adopted the rule best expressed by Mr. Justice Holmes in *Adamson v. Gilliland,* 242 U. S. 350, 353; 37 Sup. Ct. 169, 170; 61 L. Ed. 356, 357:

> "* * * the case is preeminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses or so far as there is any testimony consistent with the finding it must be treated as unassailable'. *Davis v. Schwartz,* 155 U. S. 631, 636; 39 L. Ed. 289, 291; 15 Sup. Ct. 237."

Wittmayer v. U. S. (9 Cir. 1941), 118 Fed. (2d) 808;

Anglo Calif. Nat. Bank v. Lazard (9 Cir. 1939), 106 Fed. (2d) 693 (Cert. Den.);
O'Keith v. Johnston (9 Cir. 1942), 129 Fed. (2d) 889.

The principles expressed in Rule 52(a) of the Federal Rules of Civil Procedure is a formulation of a ruling long recognized in equity (*Wittmayer v. U. S.*, supra) and as is said by *O'Brien* in his *1937 Cum. Supp. to Manual of Federal Appellate Procedure* (2d Ed. p. 62):

> "Findings of the trial court, in a suit in equity, based on conflicting testimony, taken in open court, will not be disturbed on appeal."

And in its consideration and review of the evidence and the findings based thereon, every conflict in the evidence should be resolved in favor of the findings of the trier of the fact. As was said in *Smith v. Porter* (8 Cir. 1944), 143 Fed. (2d) 292:

> "The question for decision in this case is whether there is sufficient basis in the evidence for the court's findings of fact. In deciding that question we are required to take that view of the evidence which is most favorable to the appellee."

Contrary to the suggestion of appellant in its Point I (3) at page 16 of its brief, the inferences and conclusions of fact of the trial Court are not merely entitled to slight weight. A consideration of the authorities there cited, and others, demonstrates the true rule to be that if the inference is one purely of fact

to be derived from substantial and conflicting evidence, the determination of the trial Court will be accepted as binding by the Appellate Court, and that where a mixed question of law and fact exists, the Appellate Court will scrutinize the finding of fact embodying such question only to determine if the pertinent law has been misapplied to the facts as found.

Hartford Acc. & Indem. v. Jasper (9 Cir. 1944), 144 Fed. (2d) 266, 267.

A fair example of the selection by the trial Court of an inference of fact is the decision in *Occidental Life Ins. Co. v. Thomas* (9 Cir. 1939), 107 Fed. (2d) 876, where the issue was whether an insured had suffered accidental death, the deceased having disappeared from a rowboat in a lake. The trial Court determined that he had. This Court ruled that such inference being a reasonable one, it was unnecessary that all other possible inferences be excluded by the proof, for in such circumstances the trial Court's decision was not clear error. In his concurring opinion, Judge Haney pointed out that under Rule 52(a) a finding of this character is clearly erroneous only if no reasonable man could logically make such inference.

The case of *Kuhn v. Princess Lida* (3 Cir. 1941), 119 Fed. (2d) 704, is an example of an inference concerning a mixed question of law and fact. There the issue was the reasonable value of an attorney's services. The trial Court made a finding that the services involved difficult and exacting legal questions and

fixed the fee accordingly. The Appellate Court held that the nature of the services was "matter of law" on which the Appellate Court was as able to form an opinion as the trial Court. It concluded that the services, as a matter of law, were not difficult or exacting.

The case is rare where some of the findings of fact do not involve some application of law. Nevertheless in many cases this Court has accepted such findings within the mandate of Rule 52(a).

Diamond Laundry Corp. v. Calif. Emp. Stab. Comm. (9 Cir. 1947), 162 Fed. (2d) 398;

Davis v. Johnston (9 Cir. 1946), 157 Fed. (2d) 64.

But in the present case every factual inference is logically derived and insofar as the declaration of any ultimate fact involves the application of law, such law has been correctly applied.

II. EVERY ESSENTIAL ELEMENT OF THE COURT'S FINDINGS RELATIVE TO THE NATURE AND EFFECT OF THE CONVERSATION OF FEBRUARY, 1944, IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellant in its brief, between pages 16 and 23, examines, weighs and argues the effect of the testimony in this case. Its basic contentions appear to be, first, that Suewer ought to be believed because he testified by deposition, and that Pierson ought not to be believed because his testimony in Court was more detailed than that given by him on deposition.

It will be noted that the deposition of Pierson was taken by way of discovery; he was cross-examined by appellant's counsel to such extent as that counsel saw fit at that time, but he was not given a direct examination then. Any disparity between the testimony given by Pierson on the deposition and that given on trial, is not more than the difference in the detail of the questions asked.

The trial Court had Pierson's deposition before it on the stipulation of the parties (Tr. 154), as well as the whole deposition of Suewer. To the extent that there is any conflict between the deposition of Suewer and the testimony and deposition of Pierson, it was the duty and function of the trial Court to resolve that conflict. The trial Court had the opportunity to observe and hear Mr. Pierson and weigh him in its balance, and found that what he said was credible and true. Where the testimony of Suewer by deposition conflicted, patently the truth of the two versions could not co-exist. What was said at the conference of February, 1944, was therefore a doubtful issue of fact. The trial Court's resolution of that issue will not be retried here.

Anglo Calif. Nat. Bank v. Lazard (9 Cir. 1939), 106 Fed. (2d) 693, 703;

Dumas v. King (8 Cir. 1946), 157 Fed. (2d) 463, 465.

Certainly if the testimony of Pierson alone was before the Court, its finding as to what transpired in that conference would have been conclusive. (*Weber v. Alabama-California Gold Mines Co.* (9 Cir. 1941),

121 Fed. (2d) 663).) The introduction of a deposition setting forth another's contrary memory of the facts cannot change this. While this Court has equal ability to study and appraise the deposition of Suewer, standing apart from the other evidence in the case, it would be repugnant to this Court's repeated recognition of the trial judge's function and jurisdiction in questions of controverted fact to attempt to weigh such deposition against testimony given in open Court.

Hartford Acc. & Indem. Co. v. Jasper (9 Cir. 1944), 144 Fed. (2d) 266, 267.

A. A contractual obligation was created.

Both witnesses, Pierson and Suewer, are in agreement that in February, 1944 a conversation was had respecting the subject of compensation of the key men of the organization, including Pierson. It was not the first such discussion and at that time the subject of a bonus for the key men came up for discussion and Suewer stated that he would recommend it.

Beyond this, the memory of the witnesses as to the order of the discussion and its details is divergent. In view of what has been said above it is unnecessary to reexamine the testimony of Suewer, except to state generally that he expressly or by implication denied the following details stated by Pierson, and that the trial Court resolved the conflict in favor of Pierson.

Pierson stated that the measure of the bonus was to be a sum that would make up the difference between the salary actually paid, and what other companies were paying (Tr. 68, 85), and also that it would be a

sum representing fair compensation for the work being done (Tr. 84). He stated that he informed Suewer that the key men would quit unless some such arrangement could be made (Tr. 67, 217-218). He deemed himself included among the key men (Tr. 86, 87) and Suewer, so far as he confirms the details of the conversation, also understood and intended that Pierson was one of such key men (Tr. 183). Pierson, in reliance on the foregoing, carried on in his capacity as Pacific Coast manager until the end of the war (Tr. 71, 209-210), and indeed until after the payment of the bonus was actually granted (Tr. 206).

B. Whether there was an intention to contract was a question for the trial Court.

Appellant suggests that from the evidence no inference of an intention to contract can be gleaned. It must be remembered that for every purpose Suewer *was* the management of appellant corporation at the time in question. There were no limitations imposed on his authority by the general power of attorney (Tr. 128) and whatever limitations he himself imposed in his own discretion, the fact is paramount that appellant's business *had* to run, and *had* to be operated by a staff of experienced men, and implicit in the power and duty of Suewer to hire and fire was the power to *induce the experienced staff to remain* in furtherance of the business of appellant.

Since he had this power to offer inducements to retain employees, including Pierson, the question must be, was he called upon to exercise that power and

did he exercise it? For appellant has abandoned all contention that he was in fact without authority to do so (Appellant's Opening Brief, Note 3, page 11).

It will be noted that Pierson and the other key personnel were free agents in February, 1944, employed at salaries which they considered insufficient, so Pierson broached the matter with the only person able to do anything about it: Suewer, and advised him that such key personnel would quit if they didn't get some commitment (Tr. 217-218). This Court can take judicial notice of the rising pressures among competitive enterprises during the years 1943 and 1944 to obtain skilled help from a constantly diminishing employee pool in all phases of industry. Since, as both Pierson and Suewer recognized (Tr. 209), the threat of raids upon the key personnel by competitors constituted a hazard to the welfare of a business which had expanded fivefold, then a matter seriously affecting the future welfare of an organization for which Suewer was solely responsible, was the heart of the discussions; and the defeat of that threat and that hazard may reasonably be inferred to have been of the highest importance to Suewer.

Intent to contract is such an inference of fact from the testimony that it can be best inferred by the trier of the fact. (*Biggs v. Mays* (8 Cir. 1942), 125 Fed. (2d) 693, 697.) Suewer's contention that he did not intend a contract or an obligation of a contractual nature is belied by Pierson's description of the situation. It was for the trial Court to say whether the

conference was a mere exchange of generalities, or a negotiation with a serious purpose in which there was an exchange of promises expressed or implied from what was said. It was the trial Court's determination of this issue that the parties intended a bargain, and this Court will respect that determination as one made by the tribunal best able to evaluate the evidence.

C. Suewer's promise to recommend and insist on the payment of the bonus obligated the appellant.

Appellant suggests that since Suewer placed his promise on a recommendation basis that no contract could arise. Inherent in the conversation between the parties was the realization that nothing could be done about substantially increasing compensation of the key men on a current basis. (See Point IVA, infra, this brief.)

Assuming Suewer to have been in good faith in making the promises which the Court found he did make in February of 1944, he was promising something that would be performed only when his general power of attorney had been superseded by the emergence of the management from Japanese prisons at an unknown future date. Neither party contemplated a specific sum of dollars to be paid because, for the most part, the amount to be paid depended on the duration of the war and the value of the services to be rendered on the competitive market which might go either up or down during the continuing course of that war. It was then only natural that he should defer the determination of the amount ultimately to be payable

within the understanding and to transfer the actual fixing thereof to the revived management. But these considerations were subject always to the basic premise (which the trial Court saw) that he, as the management-in-fact, would recommend to the management-to-be, and *in fact would insist upon* (Tr. 68-69), the payment of a bonus based upon those standards which the trial Court found he promised to Pierson. Neither he nor Pierson had any doubt that it would be put through on that basis and, it is the clear inference, both parties considered the bargain was made and the machinery for its accomplishment was a mere formality (Tr. 68-69).

Suewer either made the promise with the intention to perform it, in which event appellant was bound, or he made it with no intention of performing it, which appellant could not be allowed to show. In either event, he did not perform his promise—for his acts fell far short of what the Court has found he promised to do (Tr. 188-190, 147-149). The board of directors of appellant accepted, apparently without question, the recommendation that he did make (Tr. 148) but they were bound as principals to act upon that recommendation which the bargain required him to make.

D. Regarding the "retroactive" adjustment of pay.

Appellant for the first time on this appeal raises a point not urged either at the trial nor on the motion for new trial at which the lower Court reconsidered its judgment. Appellant states that the Court's finding Number 5 (Tr. 29), granting to appellee an addi-

tional sum of money based upon the worth of his services throughout the war period from December, 1941 to August, 1945 is without support in the evidence. There is nothing repugnant about an agreement that contemplates the payment of a sum measured by other standards than future performance alone. The measure of appellant's responsibility in this case is what was promised on its behalf and not the consideration required to be performed by appellee in order to receive performance of appellant's promise.

The following facts are significant as bearing upon this phase of the matter:

First, Suewer told Pierson that such would be the standard upon which the bonus would be granted (Tr. 68, 210).

The conversations of February, 1944 were apparently the culmination of a series of conversations which had occurred prior thereto regarding the increasing need for salary adjustments in view of the salaries paid by competitors (Tr. 67, 69, 182).

The increase of salaries obtainable by application to the Salary Stabilization Unit was recognized by both parties to be insufficient to prevent the draining off of key men by more attractive offers from other firms with higher pay brackets preexisting the freezing orders (Tr. 167, 209).

The program involved was not only to satisfy Pierson but to take care of a group of key employees, including Pierson, and so involved the whole personnel program of the firm (Tr. 67-68, 209-210).

Suewer is in agreement that the bonus to be recommended would cover services rendered throughout the war period (Tr. 183) and in this connection the basis upon which he fixed the bonus actually granted was the *entire war period* (Tr. 173, 194).

The object apparent in these negotiations was to hold together a staff of experienced personnel. It is not unreasonable to infer that Suewer, in his judgment as the sole manager of the entire operations of the company, was willing, as he stated, that the company should pay a bonus that would bring that staff to parity with its competitors throughout the war period, if by making such an agreement he could solidify his team of key men for the duration of the war.

This Court will take judicial notice that in February, 1944, there was no reason to anticipate the early termination of that war, and even our highest commanders did not expect the enemy to collapse until that collapse became imminent after Hiroshima. For all that, Suewer, or the General Staff of the United States Armed Forces, knew in 1944, Suewer was agreeing to a "retroactive adjustment" of 2 years pay in order to bind his principals and its executives together for 5 years or more in the future. Under such circumstances such a bargain cannot be held to have been an unreasonable or unsound one, but may well have appeared to appellant's manager what "the object of the contract was reasonably worth." (Sec. 1611 *Civil Code of California),* as the trial Court found.

E. The valuation placed upon plaintiff's services by the trial Court finds ample support in the evidence.

The nature of Pierson's services is extensively set forth in the transcript (Tr. 53-54, 58-67), as are his qualifications (Tr. 50-52), his reputation therein (Tr. 92, 93) and the quality of his work (Tr. 103-104).

Pierson, who was certainly qualified to express an opinion as to the value of his own services, placed them at $1,000 per month throughout the war period (Tr. 139-140). The witness Parkinson, general manager of several steamship companies, evaluated the services testified to by Pierson at a minimum of $12,000 per annum (Tr. 95) and as being in a bracket of $10,000 to $15,000 per annum for the period 1940-1947 (Tr. 97).

To the extent that Suewer contended that Pierson was inefficient and unsatisfactory as an employee (in explaining his reasons for setting Pierson's bonus at $2,500) (Tr. 195), the trial Court answered that contention during the oral argument by pointing out that in such case it should have been Suewer's duty to discharge him. Appellant offered no evidence whatsoever concerning the value of Pierson's services in rebuttal and no reason appears why it was not in at least as good a position to procure and produce testimony on this point as was appellee. There being substantial evidence in the record to justify the Court's determination of Pierson's worth at $1,000 per month, appellant cannot be heard now to complain that the trial Court was without specific further testimony upon this subject.

Moreover the Court could and apparently did consider, apart from the foregoing specific evaluations made of the worth of Pierson's services, the fact that Pierson assumed the duties of Bradford, his superior, in February, 1942, who had been receiving $900.00 per month (Tr. 75, 124, 177) and the fact that there was a four to fivefold increase in the volume of the work (Tr. 65).

The Court could and undoubtedly did also consider the evaluations contemporaneously placed by Suewer and the directors on the value of his work and that of Griffin, Pierson's opposite number in the East Coast office, who filled in for Suewer during his absences (Tr. 185-187). Suewer drew a prewar salary of $1,000 per month through the war period and he then demanded and received a bonus bringing his pay through the war period to $40,000 per year (Tr. 69, 176-177). Griffin was paid a bonus of $26,500 for the same period over a base salary of from $750.00 to $850.00 per month (Tr. 185). From these examples alone the Court could form its estimate of the reasonable worth of Pierson's services to the same company in his own sphere, and the relative enlargement of that worth in view of the duties and services described by him.

Appellant goes further, however, and asserts that the testimony was as to the value of Pierson's services; that the agreement testified to was to base payment upon salaries prevailing in other steamship companies, and that the Court's finding as to what was promised was based upon the reasonable value of the services performed by plaintiff for defendant during the war

period. Appellant concludes that therefore the findings are without support.

It appears to appellee that while there is certainly an abstract difference between the two categories: First, what others are paying for services, and second, what the individual is worth, yet in the present case, on the evidence, there is no difference between these categories in fact. The testimony of Parkinson, based upon his experience, of the general worth of the services tallies closely with that of Pierson as to the specific worth of his own services.

It is apparent too, from Pierson's testimony, that he and Suewer contemplated that the two standards were identical in their own minds at the time the agreement was made:

> "It (the amount) was always based upon what would be fair compensation for the work we were doing under the circumstances we were working * * * the thing was discussed on the basis of what we would shoot at. No actual amount was stipulated * * * it would be on the basis of the salaries we should have received in comparison with what other steamship companies were paying." (Tr. 84-85, parenthesis inserted).

The trial Court, too, accepted these standards on the evidence before it, as amounting to the same thing and expressed its findings in terms of the reasonable value of Pierson's services. This Court will look beyond the formal language of the trial Court's findings to determine the true intent, and if the result is supported by the evidence they are not "clearly errone-

ous'' within the meaning of Rule 52 (a). *Weber v. Alabama-California Gold Mines Co.* (9 Cir. 1941) 121 Fed. (2d) 663, 664; *Plack v. Baumer* (3 Cir. 1941) 121 Fed. (2d), 676.

Appellant places much of its argument with reference to the asserted error in evaluating Pierson's work upon its assertion that during the year 1942 the company's business was substantially stalled and that there was a lull in the activities of the corporation. It is probable that from the time the Maritime Commission took over appellant's ships until approximately September of that year when a contract was obtained with the War Shipping Administration that its affairs could not have gone with the speed with which they later did. We call the Court's attention, however, to the statistics contained in the letter of the corporation to the Treasury Department on March 16, 1945, (Plaintiff's Exhibit No. 4) (Tr. 118-119). It is apparent that the volume in 1942 exceeded the volume in 1941 *by 2½ times* while its disbursements were increasing only slightly. Appellant does violence to the facts in intimating that Pierson sat behind a desk and did nothing during the entire year of 1942.

Moreover, appellant itself took no cognizance of the ''lull'' which it now asserts, when, in making the ''adjustment of compensation'' (Tr. 151) for Suewer, it paid him $40,000.00 per annum for 1942 as well as all other war years. The state of the evidence is not such as to justify a claim of ''clear error'' with regard to the reasonableness of the trial Court's valuation of Pierson's 1942 services.

The case of *Kuhn v. Princess Lida,* (3 Cir. 1941) 119 Fed. (2d) 704, cited by appellant, is not authority for the proposition that this Court will in each instance where reasonable compensation is an issue in the case, take the determination of that matter out of the hands of the trial Court. It is pointed out earlier in this brief, (see Point I, supra), that the services evaluated in that case were legal services and as such the Appellate Court was in at least as good a position to evaluate them as was a trial Court. The factual issue in the present case is more nearly like the question of fair market value of corporate stock as stated in *United States v. State Street Trust Co.* (1 Cir. 1942), 124 Fed. (2d) 948, 950,

> "* * * the existence of fair market value is the kind of a question on which the reviewing Court should not be substituted for the fact finding tribunal."

III. AS A MATTER OF LAW, THE CONVERSATION OF FEBRUARY, 1944, CREATED A BINDING OBLIGATION.

Appellant has professed confusion as to whether appellee sought to establish an express or an implied contract or to base his claim on quasi-contractual principles. Appellee relies upon an *agreement,* orally and informally arrived at, in which every essential element was covered by the conversation of the parties and the inferences necessarily and reasonably flowing therefrom. In adverting to quasi-contractual principles, appellee intends to illuminate the contractual

nature of the bargain and to demonstrate the fundamental equity and propriety of that bargain.

The trial Court's original Order for Judgment (Tr. p. 16), its original Findings of Fact (Tr. 17-20), its Order Granting Motion for New Trial and Directing Judgment for Plaintiff (Tr. p. 24), and its final Findings of Fact (Tr. 25-31), taken together demonstrate that there was never any question in mind of the trial Court but that if any theory existed upon which the representations or misrepresentations of Suewer could be deemed to constitute an exchange of promissory considerations, it was prepared so to find.

It is clear from an examination of the Court's actions in this respect that the trial Court decided on motion for new trial that it had not given full significance on the one hand, to the inherent freedom of Pierson to quit his job and on the other hand, to the broad power and, indeed, the duty of Suewer to act on behalf of the defendant corporation to avoid the possibility of losing its key men by making adequate provision for their proper compensation.

Epitomizing the argument made to the trial Court on the Motion for New Trial, the following points are urged as persuasive here: First, that it would be an unjust enrichment to permit the defendant to enjoy the benefit of plaintiff's services, reasonably worth $1,000.00 per month (see Point II E., supra) for a substantially lesser sum, when plaintiff was induced to remain in the employment of defendant in reliance upon certain promises of Suewer, sufficiently clear in

and of themselves, to enable a Court to enforce them. Otherwise, under such circumstances, defendant would be taking advantage of the wrong of its own manager. *Restatement of the Law of Restitution,* Sec. 1; *Restatement of the Law of Agency,* Sec. 457.

A person cannot retain the benefit of a transaction conducted by his agent and yet deny the authority of the agent.

Ray v. Amer. Photo Player Co., 46 Cal. App. 311, 189 Pac. 130;

Moody v. Boas Finance Corp., 93 Cal. App. 21; 268 Pac. 974;

See also *Sec. 1589 of the Civil Code of the State of California.*

If Pierson had worked for another and Suewer had induced him to go to work for appellant in February of 1944, for the salary available under the salary stabilization laws, plus a bonus of the character indicated by the testimony here, there is no doubt that such arrangement would have been binding upon the defendant. No reason exists in law why any different rule should prevail simply because Pierson was currently employed at the time the understanding was reached, when he was free to discontinue that employment at any time.

And if, as is the rule in California, a promise will be construed out of the mere rendition and acceptance of valuable services, to pay at least the value of those services, (see *Mayborne v. Citizens Bank,* 46 Cal. App. 178, 188 Pac. 1034; *Leoni v. Delaney,* 83 Cal. App. (2d)

303, 188 Pac. (2d) 765; *Crane v. Derrick,* 157 Cal. 667, 109 Pac. 31; *Medina v. Van Camp Sea Food Co.,* 75 Cal. App. (2d) 551, 171 Pac. (2d) 445), the rule cannot justly be otherwise when the parties delineate the terms thereof with the particularity which the trial Court found here.

IV. THE CONTRACT WAS NOT ILLEGAL.

Appellant, in contending that the trial Court's Findings Nos. 5 and 11 are inconsistent, relies on a series of inferences to arrive at the conclusion that payment under the contract was to be made within a reasonable time after the termination of the war without reference to the termination of salary controls.

While Finding No. 5 is silent in regard to the termination of such controls, Finding No. 11, the more specific and hence the controlling finding, negatives any inference that the parties bargained in complete disregard of this factor in the view of the trial Court. If any superficial divergence appears to exist between the two findings, No. 11 (Tr. 31) should be taken as the finding expressing the trial Court's determination of the issue of fact involved. The mere apparent inconsistency of the two findings does not constitute fatal error unless the ultimate determination of the trial Court—that this agreement contemplated payment only after the termination of salary controls—does not find support in the evidence.

A. The logical inferences from the facts support the trial Court's finding that payment would not be made until after the termination of controls.

The logical inference, in light of the evidence and the background in which the parties bargained, was that the concept "the termination of the war" necessarily included the lifting of wage and salary controls as part of what that phrase meant to the parties.

Appellant asserts (appellant's brief, p. 31) that the only factor which the parties considered as delaying payment was the necessity of communicating with the home office in Manila. While this was a factor influencing the form the agreement took, it is absurd to say that it was the only factor. It is obvious from a consideration of the record as a whole that the parties contemplated the end of the war as the only point by which the promise could be measured in dollars, and hence only after that time could the agreement be consummated.

The following facts are significant in determining what the parties contemplated as to the time and occasion for the actual payment of the bonus:

The *whole reason* for the February 1944 discussion was that because of the existence of salary controls, appellant could not pay its employees salaries equal to those offered by its competitors who had established higher bases and that the securing of approval under the stabilization laws of any increase was difficult. (Tr. 209);

Both Suewer and Pierson knew of the requirements of the Stabilization Act of 1942 and of the necessity

of securing the consent of the Commissioner of Internal Revenue before any salary increases were paid, as this procedure was carried out a number of times during the war under the joint auspices of Pierson and Suewer. (Tr. 66, 167, 175, 208, 211);

The language used by the parties to describe the time contemplated for performance was "after the war (is) over" (Tr. 183); "when the war is over" (Tr. 184); "after the war (is) over or when the shooting stop(s) anyway." (Tr. 209); "at the end of the war" (Tr. 83).

The contemporaneous interpretation by the parties, that is, their acts relative to the performance of the agreement in issue, demonstrates their own interpretation of what their agreement was. It will be noted that Manila was recaptured in early 1945. The surrender occurred in August, 1945. Communication with Manila was restored in late 1945 (Tr. 171), but it was not until March of 1946 when Suewer first went to Manila to account for his stewardship of appellant's affairs that the subject of war time bonuses came up for settlement with the management. (Tr. 171-172, 187-190). And it was not until July of that year that any bonus was paid. Neither of the parties appeared disturbed or concerned over this slow course of affairs (Tr. 71-72, 220).

It is a fair reference to this Court's knowledge of general affairs that in the mid-war period of February, 1944, the general thinking of business men, whether correct or not, was that the termination of hostilities

would bring about the prompt termination of those temporary restrictive controls enforced for the furtherance of the war effort. The "end of the war" as used by business men, was a concept that included a vastly broader scope than the firing of the last shot. In February, 1944, Pierson and Suewer, as reasonable men, must have foreseen as probable the chaos of Manila after the war and the long period of Army restriction during which nothing but the most essential business could be carried on there. The facts and the conduct of the parties in relation to the consummation of the bonus agreement bear out this thought.

Appellant has pointed out (appellant's brief, page 32) that a large number of the war-time economic controls continued for a substantial period beyond the end of combat warfare and attempts to demonstrate in this way that the termination of the war is not equivalent to the termination of salary controls. The logic relied on here falls far short of its mark, however, because it attempts to impose hindsight upon the agreement. We are not here concerned with niceties of definition but rather with an attempt to determine what the term "the end of the war" meant to the parties at *the time the agreement was entered.*

It is perhaps well to note at this point that Sec. 6 of the Act (56 Stat. 767; 50 U.S.C. App. Sect. 966) provided, at the time of the contract, February, 1944, that the provisions of the act (including salary controls) *should terminate on June 30, 1944,* or on such earlier date as Congress or the President should prescribe.

It may be argued that it was generally understood at the time that Congress might re-enact such war legislation from year to year as the war continued, but it was also generally understood that when warfare terminated, such controls would be terminated. In light of this well recognized background, it is incorrect to say, as appellant has done (appellant's brief, p. 32), that it was a mere "coincidence" that wage and salary controls were lifted four days after the cessation of hostilities.

On the foregoing state of the record, it is impossible to say, with appellant's assurance, that this agreement contemplated the payment of any sum in contravention of the Salary Stabilization Act of 1942 or, indeed, of any extension thereof. The substantive rules of reasonable construction in force in California with regard to time of performance require the Court to consider what time would be reasonable in view of the situation of the parties, the nature of the transaction and the circumstances of the particular case. *Kersch v. Taber,* 67 Cal. App. (2d) 499, 506; 154 Pac. (2d) 934.

It cannot be said that the parties clearly contemplated, in spite of all possibility of legislative inhibition, to pay and receive the bonus on any fixed date. Rather, it is fairly to be said that the parties contemplated an honorable bargain under which the payment following the determination of the amount due was to be made only in accordance with law; that the parties considered the salary control legislation to be temporary, existing only until the end of the war (as in fact it did); and finally, that the parties contem-

plated that such bargain would be free of legislative inhibition when the time for performance arrived and that such freedom was an implicit term of the bargain because both knew that while such controls existed "it was very difficult to get approvals from the various Government bodies." (Tr. 209).

Unless no reasonable man could logically infer that this was the intention of the parties, this Court cannot say that the trial Court's finding was "clearly erroneous." *Occidental Life Insurance Co. v. Thomas,* (9 Cir., 1939), 107 Fed. (2d) 876.

B. Substantive law required the trial Court to interpret the contract only as requiring payment when lawful.

The language used by the parties, it is submitted, is not so tightly worded or so absolutely clear in its intendment as to require a construction that would make the contract illegal, if by a reasonable construction, that result will not follow. California accepts the general rule which has been stated as follows:

> "Where a contract could have been performed in a legal manner as well as an illegal manner, it will not be declared void because it may have been performed in an illegal manner, since bad motives are never to be imputed to any man where fair and honest intentions are sufficient to account for his conduct."
>
> 12 *Am. Jur.* 647;
>
> *Robbins v. Pac. Eastern Corp.,* 8 Cal. (2d) 241, 272; 65 Pac. (2d) 42, 58.

The rule is given statutory expression in California in two sections of the Civil Code.

"*Interpretation in favor of contract.* A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Sec. 1643 Civil Code);

"An interpretation which gives effect is preferred to one which makes void." (Sec. 3541 Civil Code).

It was the duty of the trial Court to consider the language used by the parties not only in the light of the circumstances surrounding the situation, but also in the light of the foregoing principles of construction. It was not error for the trial Court to select that interpretation of the language used by the parties consistent with the principles of law stated above.

C. The salary stabilization laws did not forbid this contract expressly or by implication.

Appellee will endeavor first to distinguish the authorities cited by appellant and then proceed to an examination of the Stabilization Act of 1942, the regulations issued under it and the pertinent authorities controlling its application here.

1. The cases cited by appellant are inapplicable.

It becomes apparent from a reading of the authorities cited by appellant under Sect. B of Topic VI that they are not proper authorities for the proposition that appellant seeks to establish, i.e., that the contract in the instant case is illegal and void.

Appellant has stated a general rule to the effect that a bargain for an illegal act is itself illegal and a subsequent change in the law permitting such an act does not restore validity to the agreement. (Appellant's brief, pp. 33-34). We do not contend that this rule is incorrectly stated but emphatically contend that it is inapplicable in this case. Indeed, the very authorities relied on by appellant go on to state the rule properly applicable here:

> "It would seem that where an agreement is made with reference to a contemplated change in the law and is not executed until such change is effected, it is perfectly legal." (126 A.L.R. 701).

> "In general, bargains voidable or unenforcible because made under a prohibitory statute (where the bargain is not regarded as involving serious wrong) or under an inoperative statute, or because there was no statute authorizing such bargain, are deemed validated by repeal of such prohibitory statute or by subsequent statutes enacted expressly to cure the defect, provided the legislature could have authorized or permitted the making of such contract in the first instance." Williston on Contracts, Revised Edition, Volume 6, Sect. 1758.

The California cases cited by appellant (appellant's brief, p. 34) do not serve as authority for the points which appellant seeks to establish. The essential distinguishing feature of the line of cases exemplified by *Smith v. Bach,* 183 Cal. 259, 191 Pac. 14, is that the acts in question were clearly and incontrovertibly in violation of the particular statute. Appellant has not

established that such is the case here. Likewise, the rule of *Willcox v. Edwards,* 162 Cal. 455, 123 Pac. 276, is applicable only where it is first established that a particular act is prohibited by statute.

A careful reading of *In re Pringle Engineering and Manufacturing Co.* (7 Cir. 1947), 164 Fed. (2d) 299, on which appellant relies so heavily, discloses that it can be distinguished from the instant case in material respects. The question under consideration in that case involved an agreement to pay a bonus on sales, such bonus to be "* * * figured and paid at the end of the year; * * *" (i.e., 1945). On application to the Salary Stabilization Unit, the Commissioner withheld approval of the bonus plan, directing that application be made again when the bonus payments were to be made. Salary controls were lifted August 18, 1945. The employer was declared bankrupt October 9, 1945. The employee filed a claim for the amount assertedly due under the bonus arrangement, which claim was disallowed by the referee in bankruptcy. The Appellate Court upheld the action of the referee.

A critical distinction between the bonus arrangement here and that in the *Pringle* case is that in that case the agreement of the parties contemplated the payment of a bonus at the end of 1945, without regard to the termination of the war or the abolition of salary controls. The agreement of the parties flatly called for such a payment. It was pure coincidence that salary controls were abolished prior to the due date of payment. The Appellate Court pointed out at p. 301 of

its decision that in view of the employer's insolvency it was apparent that had salary controls remained in force until the time when payment was to be made under the parties' agreement, there would not have been the slightest chance that approval would have been given by the Commissioner. The Court stated that the possibility of approval under such circumstances was "too remote for even speculation".

The case is readily distinguishable from the present situation. Here it is a fair view of the parties' bargain that they contemplated no payment until a time when in view of the policy and purpose of the salary stabilization laws they had a right to assume that those controls would either have been entirely removed, as in fact they were, or else would have been relaxed because of the end of the war, to the extent that approval of such a bonus was a likely possibility.

2. The contract made by the parties is in violation of neither the letter nor the spirit of the Stabilization Act of 1942.

Appellant has gone to some length in attempting to point out that the parties could not lawfully contract, under the Stabilization Act of 1942 and the regulations thereunder, for additional compensation payable after the termination of salary controls. Appellant's reasoning is based largely on a purported analysis of the economic consequences of allowing such contracts to be enforced. The weight to be given the language of the Act and the regulations is minimized by appellant in its treatment of the subject.

It is recognized that the Act itself does not condemn the making of this or any other type of contract. Significant portions of the Act are here set out:

> "In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities:" (Sec. 1, 56 Stat. 765; 50 U.S.C.A. App. Sec. 961.)
>
> "(a) No employer shall pay, and no employee shall receive wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation." (Sec. 5, 56 Stat. 767; 50 U.S.C.A. App. Sec. 965.)

The penalties of Section 11 relate to the above provisions of the Act as does Treasury Decision 5295, sub-part G, 8 Fed. Reg. 12428; C.F.R. 1943 Supp.,

Title 32, page 1238, which deals with the effects of unlawful payments.

> "Any individual, corporation, partnership, or association willfully violating any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment. (Sec. 11, 56 Stat. 768; 50 U.S.C.A. App. Sec. 971.)"
>
> "* * * (a) Sec. 5(a) of the Act provides in effect that the President shall prescribe the extent to which any salary payments made in contravention of regulations promulgated under the Act shall be disregarded by executive departments and other governmental agencies in determining the costs or expenses of any employer for the purpose of any other law or regulation. In any case where a salary payment is determined by the Commissioner to have been made in contravention of the Act, the entire amount of such payment is to be disregarded by all executive departments and all other agencies of the Federal Government. * * *
>
> "A payment in contravention of the Act may be disregarded for more than one of the foregoing purposes." T. D. 5295, sub-part G; 8 Fed. Reg. 12428; C.F.R. Supp. 1943, Book 1, Sec. 1002.28.

In a regulation issued by the director of the Office of Economic Stabilization, Section 4001.10, 10 Fed. Reg. 11962; C.F.R. Supp. 1943, Book 2, Section 4001.10, it is provided:

"In the case of a salary rate * * * no increase shall be made by the employer except as provided in regulations, rulings, or orders promulgated under the authority of these regulations * * *

"Except as herein provided, any increase * * * shall be considered in contravention of the Act * * * *from the date of the payment* if such increase is made prior to the approval of the Board or the Commissioner. * * *" (Italics ours.)

It is apparent from a consideration of the foregoing that the Act is designed to prevent the *paying* or *receiving* of increased compensation without the prior approval of the proper Federal authorities.

The Supreme Court of Massachusetts considered this problem in the case of *Nussenbaum v. Chambers & Chambers, Inc.*, ... Mass. ....., 77 N. E. (2d) 780. At page 782 the Court disposed of the problem in this way:

"We do not believe that the policy of the Wage Stabilization Act rendered illegal the mere act of entering into an agreement for an increase in salary or wages which might be approved by the proper Federal authority before the time agreed upon for actual payment. It would seem that in the orderly course of events negotiation and agreement would commonly precede approval. A rule based upon a contrary expectation would be needlessly harsh in its effects upon many wage earners and salaried persons who had no intent to violate the law. We have no doubt that such a rule would be contrary to the actual practice under the Act in a great number of instances.

The policy of the law would be fully sustained if approval were obtained before payments were made.

"The language of the Wage Stabilization Act lends itself readily to this interpretation. The prohibitions of the Act were specifically directed against paying or receiving wages or salaries and not against the making of executory agreements."

Not only did the "orderly course of events" dictate that "negotiation and agreement would commonly precede approval", but it will be remembered that in order to file an application for authority for wage increase, it was practical prerequisite that the parties to the application had entered a binding contract for such increase. (See Executive Order No. 9250, Oct. 3, 1942; Title II(1); 50 U.S.C.A. App., Section 901 Note; 7 Fed. Reg. 7873.

At page 36 of appellant's brief this language appears:

"The absence of authority is a strong indication that such bargains were not thought lawful, for it takes little imagination to foresee widespread use of such a device to evade the salary stabilization laws, if such contracts were thought valid."

Passing for the moment the validity of appellant's argument as to what is indicated by the absence of authority, it is apparent that appellant has taken the position at the outset that such contracts *evade* the

Salary Stabilization Act *whether or not* they be valid or be "thought valid". It is submitted that if such contracts are valid, they do not evade the law. This Court is not asked to countenance or foster an evasion of the law. The law forbids *payment* without prior approval. If the violation of which appellant warns us constituted such a disastrous threat to the war economy, why did not the Congress provide that such contracts constituted violations of the Act?

As to the absence of authority on this question, it is obvious that appellant's reasoning is a weapon which cuts both ways. It is just as logical to say that such bargains were thought lawful and were, therefore, consummated without recourse to litigation being necessary to force the reluctant employer to live up to his bargain. This Court is not required to guess which of these hypotheses is correct, but will determine Congress' purpose from the wording of its statute.

Relative to appellant's treatment of the economic consequences of such agreements, it is submitted that such a highly conjectual analysis need not be indulged in to determine if this contract is violative of either the spirit or the letter of the Act. If appellant's approach to the problem were adopted the test of the validity of such an agreement would be in essence, "Would it lead to postwar inflation?" Clearly this was not the test anticipated by Congress. Nothing in the Act itself or in the regulations issued under it justifies such a sweeping criterion. The control of current inflationary forces was admittedly a para-

mount factor considered by Congress at the time the legislation was enacted, but only as part of a basic and salient purpose to "aid in the *effective prosecution of the war.*" The very fact that these controls were removed within four days of the actual cessation of hostilities, and were never revived by Congress, is indicative of the Act's true purpose.

Appellant's arguments that such transactions are invalid because inflationary are nothing more than its unsupported opinions. When appellant asks this Court to rule that such contracts although not in violation of the Act are bad because inflationary, it is asking this Court to establish a policy rule of law by judicial legislation that the Congress of the United States has repeatedly refused to enact ever since August, 1945.

It ill behooves appellant to recoil in horror from the inflationary tendencies of paying Pierson a bonus of under $10,000.00, when in the same breath it admits that it compensated eight of its other employees at the very time he was entitled to his bonus in the total sum of approximately $130,000.00 for their wartime work. In what category does appellant place this disbursal of its wartime profits in view of its professed interpretation of the spirit of the wartime controls? It would be interesting, if impertinent, to inquire whether it claimed no credit for these expenditures under any federal tax, or any other law. It is true that these last mentioned considerations are not governing on the issue but they emasculate any pretensions of sincerity on the part of appellant in urging

that the bargain reached here violated the law because payment under it would be inflationary.

It is the general and well accepted rule that it will be presumed that an act is done in a lawful manner. Or stated somewhat differently, the burden of proof lies with the party urging that a contract was for an illegal act.

California Code of Civil Procedure, Sect. 1963 (33) lists as a presumption, effective in this state: "That the law has been obeyed."

The case of *Pappas v. Delis,* 79 Cal. App. (2d) 392; 181 Pac. (2d) 61 (hearing denied California Supreme Court; Cert. Den. U.S. Supreme Court 332 U.S. 808; 68 S.C. 107) involved an action for the sale price of onions. Defendant relied on the defense that the purchase price was contrary to OPA regulations. The Court pointed out that it did not appear on the face of the contract that it was illegal and void and that the defendant did not sustain the burden of proving illegality as he did not introduce evidence on each point on which the contract could possibly have been shown to have been legal. In the instant case, there is nothing to show that the parties contemplated performance of the contract in an illegal manner. For instance, it was not shown that they did not contemplate submitting the agreement for additional compensation to the Commissioner for approval, if controls in some form were in effect when payment became due.

The case of *Nussenbaum v. Chambers & Chambers, Inc.*, ... Mass. ....., 77 N.E. (2d) 780 used this language in discussing the very problem at hand:

> "No doubt an agreement to perform an illegal act is commonly an illegal agreement, but the difficulty in applying that doctrine here is that we do not think that any agreement to perform an illegal act is shown as a matter of law. The burden of proof was upon the defendant. * * * There was nothing that compelled the jury to find that the parties intended that the increased bonus should be paid at the end of the year, regardless of approval. Such intent to violate the law is not to be presumed." (P. 783).

Although *Gelb v. Benjamin,* 78 Cal. App. (2d) 881, 884; 178 Pac. (2d) 476, 477, involved a contract made prior to the effective date of the Stabilization Act of 1942, and the defense of illegality was not pleaded on trial, the language of the Court in regard to the burden of proof in cases of this sort is highly pertinent here. In that case the Court cited with approval the following language appearing at 6 *Cal. Jur.* p. 487:

> "Especially must a party who would upon this ground repudiate a contract into which he has entered, and which has been fully executed by the other party, make his right to such defense manifest, not only by alleging the facts constituting illegality, but also, if the terms do not disclose illegality, by negativing the existence of any facts or circumstances under which the contract could be held valid."

See also *Leick v. Missouri Plating Co.,* ..... Mo. ....., 211 S.W. (2d) 77.

A further consideration is that the defense of illegality as urged by appellant in this case is a basically inequitable one. It is clear that the De La Rama Steamship Company accepted the benefits of Pierson's services during the period of time in question. The company is now in a position whereby it seeks to retain a portion of the earnings due Pierson and attempts to justify this retention by arguing in effect that it should have obtained the approval of the Commissioner for the bonus arrangement but failed to do so. The attitude of the California Courts towards such a situation is clearly indicated in *Thacker v. American Foundry,* 78 Cal. App. (2d) 76, 81; 177 Pac. (2d) 322, 325.

It must be admitted that if such contracts for additional compensation are illegal, payment of such additional compensation for services rendered during the period in which the Stabilization Act was in effect would be just as clearly in violation of the act. The appellant vigorously cries for the protection of the Court because of the asserted illegality of the Pierson contract and at the same time offers as its principal exhibit the testimony of Suewer, a man to whom it paid $102,000 added compensation for his services during the war years (Tr. 151, 177) when by its own proposed theory such payment was entirely illegal. Appellant cannot sincerely believe the argument it tenders to the Court, and on the principles set forth above, neither can this Court.

CONCLUSION.

Appellant has attacked from every conceivable angle a rather simple agreement, the basic facts of which the trial Court had no difficulty in comprehending. It is respectfully submitted that all of its contentions have been completely disposed of in this reply brief.

Dated, San Francisco, California,
January 13, 1949.

Respectfully submitted,
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No. 12,050

IN THE

United States Court of Appeals

For the Ninth Circuit

THE DE LA RAMA STEAMSHIP CO., INC., a corporation,

Appellant,

vs.

H. H. PIERSON,

Appellee.

APPELLANT'S REPLY BRIEF

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Subject Index

	Page
I. The Scope of Appellate Review	2
II. The Conversation of February, 1944	3
III. The Conversation of February, 1944, Did Not Create a Contract of Employment	4
A. Appellee's Argument on Quasi-Contract Principles	7
IV. The Retroactive Adjustment in Pay	10
V. The Reasonable Value of Appellee's Services	11
VI. The Defense of Illegality	14
Conclusion	18

Table of Authorities Cited

Pages

CASES

Adamson v. Gilliland, 242 U.S. 350, 61 L.ed. 356, 37 S.Ct. 169..... 2

Nussenbaum v. Chambers & Chambers, Inc., 77 N.E.2d 780..... 16

Pringle Engineering & Mfg. Co., In Re (7 Cir. 1947) 164 F.2d 299..15, 16

United States v. United States Gypsum Co., 333 U.S. 364, 395, 92 L.Ed. (Adv. Ops.) 552, 68 S.Ct. 525..... 3

STATUTES AND RULES

Federal Rules of Civil Procedure:
Rule 52(a)..... 2

TREATISES

O'Brien's Manual of Federal Appellate Procedure (3d ed. 1941) pp. 19-21 and 1948 Cum. Supp., pp. 69-71..... 2

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APPELLANT'S REPLY BRIEF

In our Opening Brief we asserted a number of independent grounds for the reversal of the judgment in this case. Appellee has confined his brief to a rebuttal of those points without introducing any new matters. As a result there is no necessity for venturing into new ground in this reply. We shall confine this brief to a reexamination of our original points in the light of appellee's arguments.

I.

THE SCOPE OF APPELLATE REVIEW

In our Opening Brief (pp. 14-16) we pointed out that Rule 52(a), Federal Rules of Civil Procedure, made the federal equity practice applicable to the review of the trial court's findings in a non-jury case. We attempted to state briefly the principles which have been established as a consequence of the adoption of that rule.

Appellee acknowledges the accuracy of our statement of those principles,[1] but attempts to escape their application by arguing that in the specific cases in which those principles were declared and applied, the facts in issue were established so plainly that the appellate court could have treated the trial court's findings as an "error of law." Seemingly, appellee would brush aside what was said as dicta or careless usage of words.

It would seem to be a sufficient answer to point out that in the cases cited in our Opening Brief, the courts did not indulge in any fictions about a question of fact becoming a question of law when the evidence is very clear. Rather, those decisions dealt quite plainly with the review of questions of fact.

Appellee cites and quotes decisions and texts wherein a more restricted scope of appellate review is indicated. *Adamson v. Gilliland*, 242 U.S. 350, 61 L.ed. 356, 37 S.Ct. 169, antedates the adoption of the Federal Rules of Civil Procedure. The same is true of the quotation from the 1937 Cum. Supp. to O'Brien's Manual of Federal Appellate Procedure. The current edition of that work fully supports the statements made in our Opening Brief.[2]

Some of the cases cited by appellee have been decided since the Federal Rules were adopted. We recognize that some of the

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1. Appellee's Brief, p. 2.

2. See O'Brien's Manual of Federal Appellate Procedure (3d ed., 1941), pp. 19-21, and 1948 Cum. Supp., pp. 69-71.

earlier cases failed to give full effect to the change introduced by the adoption of Rule 52(a), but we think that the cases cited in our Opening Brief indicate that the weight of authority has come to recognize and apply the full implications of that rule and that since the decision of the Supreme Court in *United States v. United States Gypsum Co.,* 333 U.S. 364, 92 L.ed. (Adv. Ops.) 552, 68 S.Ct. 525, there is no longer any room for uncertainty about the scope of appellate review in a non-jury case.

II.

THE CONVERSATION OF FEBRUARY, 1944

In our Opening Brief (pp. 16-23) we contended that the trial court ought to have accepted Mr. Suewer's version of the conversation upon which this case is founded. We pointed out certain inherent improbabilities in appellee's version and the conflict between his testimony on deposition and at the trial.

Appellee replies that what was said is a question of fact to be resolved upon conflicting testimony and that the trial court's resolution of the conflict is conclusive.[3] It is true that the evidence was in conflict, but it certainly is not true that the trial court's decision is conclusive. The finding will be rejected as "clearly erroneous" if

> "* * * the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.* supra, 333 U.S. at p. 395.

Appellee seeks to defend the disparity between his testimony as given on deposition and at the trial by pointing out that on deposition he was testifying under examination by adverse counsel. We doubt that this circumstance excuses the variation.

We contended (Opening Brief, pp. 22-23) that even if appellee's version of the conversation is accepted at face value,

3. Appellee's Brief, p. 7.

it does not support the trial court's finding of what was said. The finding was that Mr. Suewer had promised to recommend an additional amount equal to the reasonable value of appellee's services. But appellee alleged and testified that the promise was to recommend an amount based upon comparable salaries in other steamship companies.

Appellee assures this Court that the distinction is abstract and academic.[4] We respectfully point out that the prevailing rate for appellate judges ranges between $14,000 and $18,000 per year. We think it plain that the reasonable value of the services of any particular appellate judge may be very much above or below that figure.

Appellee says, however, that in the present case it happens there is no difference between the two measures and that this is shown by the testimony of the witness, Parkinson. But Mr. Parkinson's testimony relating to comparable salaries was stricken (Tr. 97, 99). Consequently, there is no evidence in the record relating to comparable salaries.

Appellee urges that the two measures mean the same thing because appellee sometimes testified about "fair compensation" and at other times about "comparable salaries." But under the specific questioning of the trial court appellee became more explicit and definitely stated that the particular basis for the promised recommendation was to be "comparable salaries" (Tr. 84-85).[5]

III.

THE CONVERSATION OF FEBRUARY, 1944, DID NOT CREATE A CONTRACT OF EMPLOYMENT

In our Opening Brief (pp. 23-26) we asserted that even if the finding as to what was said in February, 1944 were to be accepted, it did not create a contract of employment. We pointed

4. Appellee's Brief, p. 17.

5. See Appellant's Opening Brief, pp. 19-21.

out that the question of what was said in the course of that conversation was a question of fact, as to which the finding of the trial court was properly entitled to substantial weight, but that the question of whether such words created a contract was peculiarly a question of law, or at least a question of mixed fact and law, as to which the appellate court is in as good a position as the trial court to draw the inference of contract or no-contract.

We asserted that neither party intended to enter into a contract and pointed out that it was undisputed that Mr. Suewer had informed appellee, and that appellee had understood, that Mr. Suewer had no authority to bind appellant and that he could only *recommend* an additional sum.

We asserted that as a simple proposition of contract law there could be no contract where both Mr. Suewer and appellee assumed that Mr. Suewer had no authority to enter into a contract. Appellee has ignored that contention and offers in reply an argument that, in the circumstances, Mr. Suewer *should* have made a contract because that would have been a wise and prudent thing to do.[6] That is not a sufficient answer and we assert again that on the undisputed facts this point alone is conclusive of the case—there could be no intent to contract in the circumstances and therefore no contract.

A word of explanation about Mr. Suewer's authority will be helpful. We do not doubt that Mr. Suewer had authority to enter into a contract to give appellee an increase in pay. Accordingly we dropped the defense, which was raised at the trial, with respect to Mr. Suewer's lack of authority. That defense was predicated upon the same assumption as Mr. Suewer's own denial of authority. When Mr. Suewer advised appellee in February, 1944 that he had no authority to enter into an agreement to pay appellee a bonus, the kind of bonus to which he

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6. Appellee's Brief, pp. 9-10.

referred was a bonus over and above normal compensation for services, i.e. a reward for faithful service. Mr. Suewer reasonably believed that he had no authority to agree to such a bonus. We believed that he was justified in that conclusion and raised that defense at the trial of this case. It was not until the judgment in this case that it became apparent that the trial court had construed the conversation of February, 1944 as creating an ordinary contract of employment at a higher salary, instead of an agreement to give a bonus over and above normal compensation. Consequently the defense based upon lack of authority became moot on this appeal for it never was intended to apply to the kind of contract that the trial court concluded had been made.

We asserted that for another reason the conversation found by the trial court could not have created a contract, namely, that a promise to *recommend* an additional sum could not give rise to a contractual obligation to pay the sum.

The situation is simply this: an officer of a corporation promises a dissatisfied employee that he will recommend additional compensation. The employee hopefully remains at work. Is there a contract to pay what was recommended?

Merely to state the question would seem to reveal the absence of any element of contract. But in this case the trial court found that such a conversation constituted a new hiring and that the employer thereupon became obligated to pay the additional compensation which was to have been recommended. Mechanically it is impossible to find a contract in such words. If it is a new hiring, as the trial court says it is, then the obligation to pay must have arisen immediately. But what then becomes of the express promise to recommend? That (and it was the only thing promised) becomes merely a futile act having no effect upon the rights of the parties.

Moreover, the very fact that the promise was to *recommend,* rather than to *pay,* refutes any possibility of contractual intent.

If a new contract had been intended why was there not an agreement to pay instead of to recommend? Mr. Suewer had authority to give appellee an increase in pay and had in fact done so the previous year. Appellee had no illusions about that. We respectfully suggest that an employee who has sought a commitment for higher pay but has gotten only a promise on the part of his superior to recommend additional compensation could not possibly have thought he had entered into a contract. Certainly appellee himself would have been greatly surprised to discover that after the conversation he was bound by a contract of employment for the duration of the war. But that is what the trial court inferred in Finding of Fact No. 5 (Tr. 29).

We assert again that nothing in the conversation found by the trial court to have occurred could have given rise to a contractual obligation.

A. Appellee's Argument on Quasi-Contract Principles.

Appellee specifically asserts that this case is based upon an *express agreement* but adds, by way of analogy, a discussion of quasi-contract principles.[7] The short answer would seem to be that if appellee is relying upon an express contract, there is no occasion for discussing quasi-contract principles. It might also be noted that with this admission appellee's second cause of action is abandoned.

But perhaps the point deserves a more careful analysis. It would seem probable that the trial court decided the case on an erroneous application of quasi-contract principles.[8] It may be helpful to point out why such principles have no application to the facts.

Appellee raises the analogy of the case where a prospective employee goes to work for an employer, pursuant to a conversa-

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7. Appellee's Brief, pp. 19-22.

8. See the trial court's order vacating judgment for appellant and directing entry of judgment for appellee (Tr. 24-25).

tion in which an officer of the employer promises to recommend a reasonable compensation for his services. In such a case appellee assures this Court that a promise to pay the reasonable value of the services will be implied from the bare fact of rendition and acceptance of the services. We do not doubt that this would be so. But we do not agree with appellee's second statement that the result should not differ in the present case where appellee was already employed at a substantial salary.

Appellee's argument about quasi-contract principles is based upon theories of unjust enrichment. One who renders services at the request of another without any agreement as to payment is entitled to recover the reasonable value of those services. But where an employee has agreed to work at a certain rate he cannot come into court and assert that the reasonable value of his services was greater than the agreed rate and thereby recover the excess on quasi-contract principles.

In short, the problem is whether there was a contract of employment or not, and if there was, what was the agreed rate? In February, 1944 there was a contract of employment at an agreed rate of $708.33 per month. We claim that that contract was not modified by the conversation of February, 1944 for the simple reason that there was no contractual intent. If this Court agrees with our contention there is no occasion for discussion of unjust enrichment or quasi-contract.

Appellee asserts, however, that the conversation of February, 1944 created an *express agreement* to pay appellee an amount based upon the reasonable value of his services. If that was the agreement of the parties, again there is no occasion for a discussion of quasi-contract principles.

The judgment of the trial court appears to have been based on a misapplication of quasi-contract principles. We very much doubt that the trial court believed that there was actual intent

to enter into a contract in the course of the conversation of February, 1944. We think rather that the trial court, reasoning on quasi-contract principles, started with the premise that where services are rendered and accepted without any agreement for payment, the law will imply a promise to pay the reasonable value.[9]

The difficulty in the application of that principle to the facts is that in February, 1944 appellee was already rendering services under an express agreement to pay him $708.33 per month. The trial court appears to have concluded that the implied-in-law contract superseded the express contract.

The flaw in this application of quasi-contract principles is that until the express contract for $708.33 per month was terminated there would be no occasion upon which the law could imply a promise to pay reasonable value.

It is here that appellee's argument breaks down. We concede that had an outsider rendered services pursuant to the conversation of February, 1944 there would have been an implied promise to pay the reasonable value. But it does not follow, as appellee contends,[10] that the same result should follow where appellee was already employed at an agreed rate.

Until that contract was terminated by the intent of the parties, the law would not imply a promise to pay merely from the rendition of services.

Appellee points out, however, that he was free to quit at any time and argues that since he had such power, his rights should be determined as though he had exercised it. The fact is, however, that he did not quit and the difference is not slight.

Every employee who is not bound by a contract for a specified term has it in his power to quit at any time. Certainly such an employee cannot say that he is entitled to recover the reasonable

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9. The trial court's reasoning is set forth in the order directing judgment for appellant (Tr. 16-17) and in the later order vacating the judgment and directing judgment for appellee (Tr. 24-25).

10. Appellee's Brief, p. 21.

value of his services, although they exceed the agreed rate, simply because he had it in his power to quit. The fact is, of course, that if an employee quits there is very little probability that he will be permitted to continue working under such circumstances and there is no reason to assume that the result would have been different in appellee's case.

The quasi-contract analogy, therefore, is not only inapplicable, but misleading.

IV.

THE RETROACTIVE ADJUSTMENT IN PAY

The trial court found a new contract of hiring in February, 1944 whereby appellee was hired from that date to the end of the war at the reasonable value of his services from December 7, 1944 to the end of the war. We asserted in our Opening Brief (pp. 26-27) that if a contract of hiring resulted from the conversation of February, 1944 it was a contract to employ appellee for the reasonable value of his services *during the period to be covered by the contract,* namely, February, 1944, to the end of the war. We pointed out that an intent to include a retroactive pay adjustment was highly improbable in the circumstances and that we found no support in the evidence for finding such a term in the contract. Appellee has sought to point out the evidence to support this finding. It would be pointless to argue the effect of this evidence at length, and we leave the conclusion to this Court.

In addition, we pointed out that the finding of such a term in the contract contradicted the reasoning by which the trial court deduced the very existence of the contract. The trial court, reasoning upon principles of quasi-contract, concluded that a promise to pay the reasonable value of the services would be inferred from the circumstances. We pointed out that the compensation determined by the trial court to be due necessarily was greater than the reasonable value of what was contracted

for, because it was the trial court's judgment of the reasonable value of the services performed under the contract, plus a retroactive adjustment.

We think that the point is not met by appellee's contention that it would have been reasonable to have made a bargain such as the trial court found.

V.

THE REASONABLE VALUE OF APPELLEE'S SERVICES

We asserted (Opening Brief, pp. 28-30) that the trial court's finding of the reasonable value of appellee's services, which was supported solely by appellee's own words, was contradicted by inferences from other testimony and by undisputed facts.

Appellee seeks to support the finding by asserting that the witness Parkinson evaluated the services testified to by appellee at a minimum of $12,000 per annum (Appellee's Brief, p. 13). We noted this testimony in our Opening Brief and pointed out that Mr. Parkinson's testimony related to the *kind of services rendered during the peak of war shipping business* and did not support, but indeed, contradicted, the finding as to the value of the services during periods in which the volume of business was less—such as the year 1942.

Appellee also asserts that Mr. Parkinson placed such services in the bracket $10,000 to $15,000 per annum for the period 1940-1947.[11] That statement is misleading. Mr. Parkinson did not testify that the reasonable value of appellee's services was in that bracket during the period 1940-1947. In the first place he was testifying about *comparable salaries* rather than the value of appellee's services. Moreover, his testimony was that during the period 1940-1947 the prevailing rate was $10,000 to $15,000 per annum *for duties of the kind appellee performed during the peak period of war shipping business.* That is a long way from supporting the conclusion that appellee's services were worth $10,000 to $15,000 per annum during this period. As we

11. Appellee's Brief, p. 15.

pointed out in our Opening Brief, appellee's services during 1942 were less than in 1941 and less than the high rate of activity during the peak of war activity.

Moreover, appellee neglects to point out that Mr. Parkinson's testimony was stricken (Tr. 97, 99). But even if not stricken it could not aid appellee because if appellee's services at the *peak period* fell into the $10,000-$15,000 bracket they must have been worth substantially less in periods such as 1942.

Appellee asserts that appellant cannot complain about the absence of more adequate testimony on the specific point of the worth of appellee's services.[12] We may ask, why not? The burden was on appellee to establish this point. Moreover our objection is not so much based upon the *lack* of testimony as to the fact that there is actual contrary evidence in the physical circumstances and in the inferences from testimony.

Appellee suggests that perhaps business was fairly active in 1942.[13] This is contrary to counsel's opening statement at the trial (Tr. 41) and to the evidence reviewed in our Opening Brief. Appellee seeks support for the point by invoking a statement contained in Plaintiff's Exhibit 4, which was an application to the Treasury Department for approval of a wage increase. In that statement, which was prepared and filed over appellee's own signature, it was said that in 1941 the company handled 21 steamers in California ports and in 1942 handled 54 steamers. Appellee thereby concludes that business was 2½ times more active in 1942 than in 1941, although the evidence reviewed in our Opening Brief indicates that there was a substantial drop in activity.

But that statement of the number of steamers handled is contradicted by a tabulation in another of appellee's exhibits, Plaintiff's Exhibit 2 (Tr. 113). That exhibit also was an ap-

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12. Appellee's Brief, p. 15.

13. Appellee's Brief, p. 18.

plication to the Treasury Department for approval of an increase. It too was prepared and filed over appellee's own signature. However, it stated that in 1941 there were 56 steamers handled in Los Angeles and San Francisco against only 50 in 1942.

We respectfully submit that the contradictory inferences drawn from these applications to the Treasury Department do not give a reliable picture of business activity and certainly gave no basis for disregarding the well-established fact of a substantial decline in business activity in 1942.

Moreover statistics about the number of steamers handled do not give a true picture in any event, even if the statistics are reliable. The number of steamers handled is not a criterion of the comparative volume or weight of responsibilities during the pre-war and war-time period. In the pre-war period, when appellant was operating its own steamers, the duties were different than those in 1942 and in later years when it operated only as an agent.

As a last resort, appellee seeks to support the finding about the reasonable value of his services by showing the amount received by Messrs. Suewer, Griffin and Bradford. Appellee stretches the evidence in saying that he assumed the duties of Mr. Bradford in 1942.[14] Mr. Bradford was Mr. Suewer's assistant in charge of the United States organization and when he went into the Army Transport Service in 1942 his duties were in fact assumed by Mr. Griffin (Tr. 122-125).

With respect to Mr. Griffin, appellee again stretches the testimony in stating that he was appellee's opposite number on the east coast. In fact, Mr. Griffin was not only head of the east coast office but also was Mr. Suewer's assistant in charge of the entire United States organization and appellee was under his direction as well as Mr. Suewer's (Tr. 122-125).

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14. Appellee's Brief, p. 16.

The amount received by way of bonus or adjustment of pay for Mr. Suewer and Mr. Griffin thus is no standard for comparison as to the value of appellee's own services. Certainly appellee's duties, responsibilities and performance, are in no way comparable to those of Mr. Suewer who, during the war, was left in sole charge of the United States organization and handled this work with considerable success. Moreover, neither Mr. Griffin nor Mr. Suewer received anything pursuant to a contract. The motives and considerations which led the Board of Directors to approve the adjustments in their pay are not relevant to the value of appellee's services.

VI.

THE DEFENSE OF ILLEGALITY

We asserted (Opening Brief, pp. 30-36) that the contract found by the trial court, however the findings may be interpreted, was illegal and void. We pointed out that there were inconsistent findings as to the time for payment. One, which was supported by appellee's allegations in the verified complaint and by inferences from other terms of the contract, set the time for payment without regard to the termination of wage controls. The second purported to find an agreement that payment was to be made after termination of wage controls.

Appellee says that the second is more specific and therefore controls. We do not see why the second is more specific than the first and do not think the second is supported by the evidence.

Appellee asserts that the parties intended payment to be made after termination of wage controls because the "whole reason" for the discussion of February, 1944 was the impossibility of making payment at that time on account of salary controls.[15] It is sufficient to point out that that is not what the parties said.

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15. Appellee's Brief, p. 23.

The only reason expressed by them for delaying payment was the necessity for communicating with the management in Manila for authority to enter into the agreement (Tr. 210, 166).

Appellee says that the end of the war was a loose way of saying the end of salary controls.[16] But the contract of hiring found by the trial court was also to last until the end of the war. Had salary controls been lifted in June, 1944 would the contract have ended? Appellee assures us that it would not, for in his complaint he alleges that the term of the contract was the duration of actual combat warfare which ended on August 14, 1945 (Tr. 3-5).

Appellee urges that a bargain should be construed in such a way as to be legal if that is possible (Appellee's Brief, p. 28). Such a rule of construction cannot supply intent. Moreover, as we point out below, on either interpretation the contract would be illegal.

We pointed out in our Opening Brief that the principles of law applicable to determining the legality of the contract depend to some extent on whether the contract was one to pay at an ascertainable future date regardless of the existence of wage and salary controls or whether it was a contract to pay after termination of wage and salary controls.

In the first situation we pointed out that the great weight of authority established that such an agreement would be illegal and void, because it would be a bargain to do an illegal act, and that it could not be revived by repeal of the prohibitory law. For this proposition we relied upon authorities on the principles of illegality in general and specifically upon the case of *In Re Pringle Engineering & Mfg. Co.* (7 Cir. 1947) 164 F.2d 299. That case is squarely in point. Appellee's attempt to distinguish it on the ground that, because of the subsequent bankruptcy of the employer, there was only a small possibility that the Treasury

16. Appellee's Brief, p. 24.

Department would have approved the bonus is unavailing. Appellee himself recognizes that the bargain which he claims to have entered into here would not have been approved by the Treasury Department. Indeed, he explains that that was the real motive for entering into the bargain (Appellee's Brief, pp. 23, 26-27).

If this Court accepts the finding that the time for payment was set irrespective of the termination of wage and salary controls, then, on the authority of the *Pringle* case and others cited in our Opening Brief, we submit that the contract is illegal and void.

If, however, this Court accepts appellee's argument that the contract was one to pay after termination of salary controls for services rendered during the period of salary control, then the *Pringle* case is not a square decision on that point. Neither are any of the cases cited by appellee.

Appellee cites certain texts[17] indicating that an agreement made with reference to a contemplated change in the law, and not executed until such change is effected, is lawful. The very quotation reveals the failure of the argument, for this contract was intended to be and was executed, at least on appellee's side, before termination of wage controls.

Appellee relies upon the Massachusetts case of *Nussenbaum v. Chambers & Chambers, Inc.*, 77 N.E.2d 780. That case, like the *Pringle* case, involved an agreement made during the period of salary controls for payment at a future date and, prior to the time for payment, salary controls were lifted. The Court sustained the agreement, but the decision is not contrary to the *Pringle* case for, as revealed in the passage quoted on p. 34 of Appellee's Brief, the decision of the Massachusetts court was based upon a presumption of legality and the failure to show that there was no intent to apply for approval of the increase.

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17. Appellee's Brief, p. 29.

In short, the Massachusetts court deemed the agreement to be a tentative bargain for payment which the parties intended to submit for approval. In the present case no such assumption can be asserted. It is perfectly clear from appellee's whole argument that the bargain which he claims to have entered into was not intended to be submitted to the Treasury Department for approval. For appellee explains the whole motive of the contract as one to escape the salary restrictions.

Appellee asserts also that "it was a practical prerequisite" that the parties to an application for approval had entered into a binding contract for such increase. We point out that it is perfectly clear that such a contract could not be binding without approval and could have only conditional effect.

In our Opening Brief we analyzed the purposes and policies of the Stabilization Act of 1942 and pointed out that a bargain to grant wage increases with payment deferred until after termination of salary stabilization would have conflicted with the purposes and policies of that statute. Appellee passes lightly over our analysis of the statute and asserts that the court should not consider the purposes and policies of Congress in enacting the law. We disagree. We pointed out that a contract may be unenforceable because it is contrary to the policy of the law. How then can the policy be irrelevant?

Appellee dismisses our analysis of the purposes of the law by stating that we deal only with post-war inflation and that Congress was more concerned with effective prosecution of the war than with post-war adjustments. Post-war effects were only a small portion of our analysis. We pointed out that the true purpose of the statute was to make possible *price* stabilization by freezing wages and other costs. This sort of bargain would merely defer payment and would not freeze costs at all. The inflationary pressures upon price *during the war* would continue.

Appellee asserts finally that the defense should not be asserted

by appellant because, after termination of salary controls, appellant paid bonuses to other key employees. What was paid to the other employees was not paid by reason of a contract and the problem involved here simply did not arise.

CONCLUSION

Appellee asserts that we have made many contentions in connection with a rather simple agreement. It is true that we raised numerous points of objection to the judgment of the trial court. The complexities which gave rise to those points refute the claim that this is a simple agreement. Indeed, a bargain for a wage increase *should* be a very simple contract. That this bargain is not a simple one is a consequence of attempting to twist a promise to recommend a bonus into a contract to pay a wage increase.

January 21, 1949.

Respectfully submitted,

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